United States Court of Appeals

for the Second Circuit

APPENDIX

75-7600

United States Court of Appeals

For the Second Circuit

B

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

against

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
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A. DANIEL FUSARO, CLERK
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CRAVATH, SWAINE & MOORE
Attorneys for Plaintiff-Appellant
One Chase Manhattan Plaza
New York, New York 10005
(212) 422-3000

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10022
(212) 644-8000

BERNARD KORMAN, Esq.
One Lincoln Plaza
New York, New York 10023
(212) 595-3050

Attorneys for Defendants-Appellees
ASCAP, et al.

HUGHES HUBBARD & REED
Attorneys for Defendants-Appellees
Broadcast Music, Inc., et al.
One Wall Street
New York, New York 10005
(212) WH 3-6500

STROOCK & STROOCK & LAVAN
Attorneys for Defendant-Appellee
Warner Bros. Inc.
61 Broadway
New York, New York 10004
(212) 425-5200

SIMPSON THACHER & BARTLETT
Attorneys for Defendants-Appellees
MCA, Inc., and Duchess Music Corp.
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

LINDEN & DEUTSCH
Attorneys for Defendants-Appellees
G. Schirmer, Inc., and
Associated Music Publishers, Inc.
110 East 59th Street
New York, New York 10022
(212) 758-1100

HOFHEIMER, GARTLIR,
GOTTLIEB & GROSS
Attorneys for Defendants-Appellees
Essex Music, Inc., and
Hollis Music, Inc.
100 Park Avenue
New York, New York 10017
(212) 725-0400

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AFTERNOON SESSION

BURTON LANE, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. RIFKIND:

Q Are you here today under subpoena?

A Yes, I am.

Q Have you been informed by counsel of BMI or ASCAP that they intend to call you as a witness in this case?

A No, I have not.

Q Mr. Lane, do you know what the phrase "universal coding system" means?

THE COURT: C-o-d-i-n-g?

MR. RIFKIND: Yes, your Honor.

Q (Continuing) Does that phrase mean anything to you?

A I am not sure. Are you referring to something that we are about to do in our Guild?

Q I am referring in point of fact to the April, 1972, issue of the Guild Bulletin which contains an article entitled Tracer of Lost Songs (Universal Coding) by Burton Lane.

A Right.

Q Tell me what it means.

MR. TOPKIS: Before we go into this fascinating subject, is there some relevancy?

THE COURT: I will not make him show relevancy any time in advance. I assume Mr. Rifkind will want to prove something to me that has something to do with today's proceeding as it develops. If not, I can strike it.

A Very often, when American songs are published in foreign countries and foreign lyrics are put to these songs, we have difficulty in knowing whether when we get our statements the correct songs are being logged, whether we are getting the correct royalties, and the idea that I had was a coding system whereby every song written would have a code number which would follow it for the life of the song. It would appear on all recordings, sheet music, and the code number would indicate the source of its origination, that is the country from which it came, what performing rights society was releasing that song, was licensing that song, so that we could know what was happening to our works when we could not recognize it from its title.

Q Sort of an international Social Security number for the song?

A Probably. That's a good description.

Q Is this a project you have been working on?

A It is a new idea, and it is an idea that I intend

to work on.

Q Has The Guild set up a committee to promote it or to explore it?

A I am exploring it.

Q I see in The Guild Bulletin a heading Universal Coding, Burton Lane (Chairman). Is that a one-man committee?

A I guess so.

MR. TOPKIS: Is that the end of "Universal Coding"?

MR. RIFKIND: Yes.

MR. TOPKIS: I do move to strike it. Your Honor, that was a total waste of time.

THE COURT: Let's see if it was.

Do you want to indicate what you consider relevant?

MR. RIFKIND: It seems to me that the feasibility, the practicality, of an identification number for each song indicates that there are systems which would make more feasible a per use licensing system and the administration of such a system.

THE COURT: I will accept it subject to argument.

Q Just before the luncheon break, Mr. Lane,

I started to show you Plaintiff's Exhibit 135.

I ask you if you can tell me what this is (indicating).

First of all, let me ask you this: Is that your signature at the foot of page 3?

A Yes, it is my signature.

Q Is this a memorandum that you wrote?

A I believe this memorandum was prepared by legal counsel.

THE COURT: For AGAC or whom?

THE WITNESS: For our Guild to be sent to the West Coast members.

Q Did you sign it in your capacity as president of The Guild?

A Yes. I guess I did that, although it does not say "President" on here. I was president at the time.

Q What is the West Coast Committee to which it is addressed?

A At the time of this date there was a very loosely knit group of members which we referred to as a West Coast Committee. They actually had no official position. They were not members of our council, but they were a group of interested writers who lived on the West Coast and took an interest in the affairs of our Guild.

Q And were members of The Guild?

A They were members of The Guild.

Q Did they meet with some regularity?

A Very informally.

Q Informally?

A Yes.

Q How many members of the West Coast Committee were there?

A That would vary from time to time. I guess as many as you could get around the table where they would meet would form that committee.

Q Did they communicate with The Guild council from time to time?

A Yes, they did.

Q And The Guild council would write them back or the president through the direction of The Guild council?

A Yes.

Q Turning to page 2 of your memorandum, I call your attention to the last paragraph where you state that the matter --

MISS KEARSE: I object to any reading from this document unless it is in evidence.

THE COURT: I believe it has to be in evidence.

MR. RIFKIND: I offer it in evidence at this time.

MISS KEARSE: I object to the document, your Honor.

I would like to conduct a voir dire of the witness, if I may, to clarify the objection.

THE COURT: All right.

VOIR DIRE EXAMINATION

BY MISS KEARSE:

Q Mr. Lane, is The Guild a party to this lawsuit?

A No, we are not.

Q Is any officer of The Guild ex officio an officer of BMI?

MR. RIFKIND: I object to the question. I don't know what it means. I am sure it calls for a legal conclusion, which I am not sure Mr. Lane is prepared --

THE COURT: I suppose you mean automatically by virtue of his being an officer of The Guild?

MISS KEARSE: Yes.

THE COURT: You may answer.

A I don't think I understand your question, please.

Q Is there any officer of The Guild who was automatically thereby an officer of BMI?

A No, sir.

Q Is there any officer of The Guild who is automatically a member of the board of directors of BMI?

A No.

Q Is there any officer of The Guild who is automatically a member of any committee of BMI?

A No.

Q Is there any officer of The Guild who is automatically a member of the Board of Directors of ASCAP?

A No.

Q Is there any officer of The Guild who is automatically an officer of ASCAP?

A No.

Q Or a member of a committee of ASCAP?

A Yes.

Q What committee would that be?

A The Writers Advisory Committee.

Q That person would be yourself?

A That's right.

Q Are you automatically a member of that committee by virtue --

A No, no. I am not "automatically."

Q Are you an officer of The Guild right now?

A Not at this moment, no.

Q Does The Guild engage in the licensing of music users?

A No.

Q Not for performance rights or mechanical rights and synchronization rights?

A No.

MR. RIFKIND: I object to this line of questioning. I don't see how it possibly relates to the admissibility of this document that Mr. Lane wrote to a group of writers in evidence.

THE COURT: I don't see why the latter part would, on the voir dire. As to the first questions, I think they may be considered relevant in the sense that you are trying to prove that AGAC is not a party to this suit nor is there any connection. I don't think it forecloses the question as to whether this is admissible or not.

MISS KEARSE: I am intending to show that not is The Guild not a party or privy to this lawsuit, it is not even paradigm as we described the Harry Fox Agency yesterday.

THE COURT: I do not think it proves it is or is not a paradigm.

Any further questions on voir dire?

MISS KEARSE: No. I have no further questions.

THE COURT: I would like to ask Mr. Rifkind what he is offering to prove by this. I could read it

more intelligently if you can tell me what you are going to prove.

MR. RIFKIND: This document relates to, on its face, the 3M situation and the licensing of 3M as opposed to direct licensing, a subject in which The Guild took an interest.

MISS KEARSE: I object to it on the ground that it is hearsay and that the attitudes of activities or internal affairs of The Guild are not relevant or material to this lawsuit.

MR. TOPKIS: May I add a word of objection?

Mr. Lane is here. He is being interrogated, I take it, about what he did. The best way to interrogate him is to ask him what he did and not to ask what letter he wrote congratulating himself or The Guild or criticising himself or The Guild about things.

THE COURT: That may be the best way, but that doesn't mean it is the only way counsel can do that if the document passes muster, the test of admissibility.

You will have to give me a moment to look at it to see whether I feel it is admissible or not.

(Pause.)

THE COURT: The only material I can see that relates to 3M is the bottom paragraph, page 2.

MR. RIFKIND: That's the principal portion, although there is another paragraph.

THE COURT: Would you say that you can connect it with the 3M situation?

MR. RIFKIND: I believe so.

MISS KEARSE: No matter what the subject matter, it is still hearsay and the witness is here. If he did certain acts that are relevant to this case he can tell us about it.

THE COURT: I don't see why it is hearsay when a man writes a memorandum on a subject. It is not hearsay as to him. Why is it hearsay?

MR. TOPKIS: May I suggest an explanation, your Honor?

It is an out-of-court declaration which is, I take it, being offered for the truth of that declaration.

THE COURT: Oh, no. I would not think so. It is offered only to the fact that this witness wrote such a memorandum.

MR. TOPKIS: Oh, no.

THE COURT: That's the only basis upon which I will accept it.

MR. TOPKIS: And for that basis it has no relevancy because --

THE COURT: It does, because, if you will permit Mr. Rifkind to question the witness --

You say that he can't question the witness on the basis of it because it is not in evidence, and then you say it cannot go into evidence for the purpose of his questioning.

I will accept the last paragraph, page 2, solely as evidence of the fact that this witness wrote that paragraph at the time in question. Of course to prove the facts contained in it the witness will have to be questioned further.

Let me make a note for the record that the last paragraph of page 2, Plaintiff's Exhibit 135, is received in evidence as indicated.

(The aforementioned portion of Plaintiff's Exhibit 135 received in evidence as indicated.)

BY MR. RIFKIND:

Q Mr. Lane, what is the 3M situation to which you refer in this paragraph of Plaintiff's Exhibit 135?

A 3M -- I think it is called the Minnesota Mining Corporation -- developed a machine which would play a tape consisting, I believe, of several hundred songs that would be put on one tape. Its intent was to service places that use music very similar to the way Musac is used,

which is a wired music service, doctors' offices, super-markets, that kind of thing. From what I can remember, they started to negotiate a license to use ASCAP music with ASCAP. Negotiations broke down at a certain point.

They then contacted a number of publishers, which they had every right to do and which we, in AGAC, recognized that they had a right to do. What concerned us in their by-passing ASCAP was the writers would not have a voice in the negotiations with them if they only negotiated with publishers.

We had a long history of differences with publishers. I dont want to mention any names. It is not important, but I can only say that as a result of our collection plan, which I referred to earlier, our Guild has recovered for our members over $4,000,000 of royalties which they never received from publishers. So that when we were by-passed, that is ASCAP, where writers would have a voice, we were concerned about that aspect of their dealing with publishers directly.

Also, we didn't know for sure at that time that publishers were willing to make block deals with 3M. This is something we have in our minimum basic contract.

Publishers are not permitted to make that kind of deal without the consent of the writer.

We were concerned about that aspect of their dealing directly with publishers.

Another concern of ours was what would happen to these tapes once their arrangement with 3M had expired. We felt that the publishers had no machinery for policing to see that there were no infringements of our works.

The West Coast Committee became very hysterial about this particular situation, but this was not atypical of the West Coast Committee. We have a long history of their being hysterial about a lot of things which led them to make suggestions to the council which, after thorough consideration and discussion, we would not adopt. We would not adopt their suggestions.

For instance, in this particular situation they recommended action which we were advised was illegal. We recognized that ASCAP has a limited license. It is not --

THE COURT: You mean it is non-exclusive?

THE WITNESS: Non-exclusive.

A (Continuing) So that any potential customer had the right, if they could not make a deal with ASCAP, to pass ASCAP and try to reach the people who controlled the copyright.

So what 3M was attempting to do was absolutely

legal. What the publishers, those who wanted to deal with 3M -- that was also legal, just so long as they didn't violate our interests which we had with the publishers.

That was where our concern lay, in that area.

After I -- well, this letter was written in 1967 and --

THE COURT: The exhibit, you are talking about?

THE WITNESS: Yes. But what I'm referring to in my paragraph, which is kind of patting ourselves on the back, was that I had previously written a letter to the publishers expressing our concern about block licenses, and trying to persuade them not to indulge in that because that would be a violation of our contract.

Alan Arrow, who was an official of the 3-M Corporation, was disturbed when he heard about this letter that I had written on behalf of our Guild.

I am going beyond this question to give you a picture --

THE COURT: I am not sure you are competent to testify he was disturbed unless he expressed that disturbance to you directly. But, even so, there might be a question.

THE WITNESS: Yes, he did express that upset with me, and I offered to meet with him, which we did. We met at our Guild office, in which, at that meeting, I expressed our interest in having them negotiate a proper deal because we were interested that they would use our songs.

Q A proper deal with whom?

A With ASCAP or with the publishers -- you see,

we exoressed iyr cibcerb ti Alan Arrow that when they dealt with the publishers our interests were being threatened by the publishers, making bulk deals without seeking our permission.

Thon I offered our services to bring ASCAP and the 3-M company together, and he welcomed that suggestion, hwereupon I contacted Stanley Adams and Herman Finkelstein. Stanley Adams is the president of ASCAP and Herman Finkelstein is the counsel for ASCAP. And they agreed that they would meet at our Guild's office with Alan Arrow. This was arranged.

And at that meeting --

THE COURT: Were you there?

THE WITNESS: I was there, yes.

A -- there were other members -- there was another member of our Guild there, and as I was reminded at the time I made the deposition our counsel was there. Our legal counsel, Leon Kellman.

That meeting ended with both parties agreeing to get together and try -- and to negotiate in good faith.

THE COURT: Both parties being --

THE WITNESS: Being ASCAP, represented by Herman Finkelstein --

THE COURT: And 3-M?

THE WITNESS: -- and 3-M represented by Alan Arrow.

A (Continuing) These negotiations, after, I don't know the exact time, but many months, ended in a negotiated deal where both parties were pleased.

I am referring to those series of meetings and our interest and our participation in bringing two parties together when I say that we did a very effective job. This is what I'm talking about.

THE COURT: I understand.

Q You say, "The statements which we issued." You referred to one statement just a moment ago, your letter to the publishers.

A Yes.

Q Were there any other statements?

A Were there any other statements?

Q Yes.

THE COURT: Of the Guild?

MR. RIFKIND: Yes.

Q The term, "The statements which we issued," in this memorandum, PX-135, does that refer to any statements other than the letter memorandum you sent to the publishers?

A I don't know. I don't remember.

MR. TOPKIS: I'm sorry. I didn't hear your last answer.

THE COURT: He doesn't remember.

THE WITNESS: I don't remember.

Q What led you to the conclusion that the statements which you had issued had great effect in causing publishers to reconsider this question and refrain from participating?

A As I look at this now, I don't remember what I'm referring to, because I do know that there were a number of publishers who made separate deals with 3-M. So at this time, which is seven or eight years later, I don't remember exactly.

Q Was it your understanding, insofar as you can recollect the status of things in July of '67, that there were indeed publishers who had reconsidered the question and/or refrained from participating?

A I think that when publishers heard that we had been helpful in bringing 3-M and ASCAP together, I think they were satisfied because I think this was the solution they probably preferred.

Q Well, Mr. Lane, do you recall when it was that ASCAP and 3-M finally did reach an agreement?

A Do I remember the date?

Q Do you remember whether it was before or after the date of this letter?

A No, I don't know that they had reached --

Q Let me call your attention to the statement in the next sentence: "We have good reason to believe that progress is being made," which I take it refers to the ASCAP-3-M discussions?

A Where are you reading now?

Q The third sentence in the bottom paragraph on Page 2.

A The second sentence?

Q Yes. The sentance begins: "Further, as we had informed you, we took important steps to bring 3M and ASCAP together."

A Well, then, obviously this letter took place before a deal was finalized between ASCAP and 3M.

Q Now, do you recall, Mr. Lane, when it was that you made at least the first of the statements which you say "we issued"?

A Do I remember when I made it?

Q Yes. You issued a statement to the publishers. Do you recall --

A It was obviously before this.

Q Do you remember how long before?

A No, I really don't.

Q Let me show you eM PX27 and ask you if it refreshes your recollection.

MR. TOPKIS: Your Honor, if I may, I am at a loss to understand the way we are proceeding. It seems to me we are wasting a lot of time. All of this is a matter of documentary record. There is no question when Mr. Lane wrote the document that is now being shown to him. And instead he has been asked does he remember when and does it refresh his recollection.

THE COURT: It may be a matter of documentary, susceptible of documentary proof, but the exhibit isn't in. If you want to stipulate what the date is, fine.

MR. TOPKIS: I would be delighted to.

THE COURT: All right.

MR. RIFKIND: I would be delighted to rely on documentary evidence, if Mr. Topkis won't object to my putting in 3M PX-27.

MR. TOPKIS: For non-hearsay purpose, I have no objection to it.

THE COURT: I don't want to accept a lot of papers other than are necessary. If it's only for the date --

MR. RIFKIND: At the moment. We will come back to it.

THE COURT: We stipulate that the date of that document is the correct date, is that right?

MR. RIFKIND: The date of the document, I'm sure Mr. Topkis will agree --

MR. TOPKIS: That has been stipulated to, your HOnor, in the pre-trial order, as I recall it.

THE COURT: It may be so. I don't remember.

Q The date of the document is November 15, 1965.

A All right.

Q So that you made these statements, if I can understand it -- or you made this statement to the publishers -- in November '65. The document we are now examining, that is, PX-135, was written in July 1967, over a year and a half later, and still no ASCAP-3M agreement had been reached.

So, what I want to know, Mr. Lane, is whether it was your understanding at the time you wrote PX-135 that the publishers had reconsidered the question and refrained from participating in light of the statements that you made to them.

MR. TOPKIS: I find that question objectionable as a matter of form. He is asking the witness to psychoanalyze publishers, and it is a compound question that really almost defies understanding.

THE COURT: I will sustain the objection as to form

and I don't know that the witness is competent to testify unless he has any personal information from the publishers as to why the publishers did what. He can give us the chronology of the situation and we can draw our own inferences from it.

Q Mr. Lane, when you wrote that the statements that you had issued had had great effect in causing publishers to reconsider this question and refrain from participating, did you believe that statement to be true?

MR. TOPKIS: I object. I am willing to stipulate that Mr. Lane believed it to be true, and I submit that his belief or nonbelief is totally irrelevant.

THE COURT: I will sustain that, but I'll allow you to ask the witness what the basis for his saying so was.

Q What was the basis for the statement, to the best of your recollection?

A I believe that the basis for the statement was that we had brought two parties together to sit down and negotiate in good faith.

Q That is the next sentence. I am trying to get an answer to what the statement -- what the basis for your statement is that the statements that you had issued had had effect in causing publishers to reconsider and refrain from

participating. What is the basis for that statement?

A I think I've answered that.

THE COURT: No, Mr. Lane. You have told us that you got in touch with the publishers and you have told us that as a fact they apparently pulled out. Now, that isn't quite the same --

MR. TOPKIS: If your Honor please, I don't believe the witness has told us that he got in touch with any publishers. He told us he met with Alan Arrow and Herman Finkelstein.

THE COURT: All right. That he wrote that and distributed that statement to publishers.

MR. TOPKIS: All right.

THE COURT: And that sometime between then, November of '65, and July of '67, apparently the negotiations again resumed on a direct basis between BM and ASCAP without the publishers.

Am I right so far?

THE WITNESS: Yes.

THE COURT: Now, in this Exhibit 135, which you have in your hands, you stated to your West Coast people that you had -- what are the words, Mr. Rifkind?

MR. RIFKIND: "That the statements which we had issued we think had great effect in causing publishers

to reconsider the question and refrain from participating."

THE COURT: Right. What was it that made you think that your statements had had great effect?

THE WITNESS: I don't know. I would imagine if we cautioned publishers not to make block deals, which would be a violation of our contract, I think they would have to reconsider.

THE COURT: Well, as far as you can recall, was that something you had in mind when you wrote that?

THE WITNESS: That was what we had in mind.

THE COURT: All right.

Q Was it your understanding, Mr. Lane, when you wrote this, that publishers had ceased engaging in block deals with 3M but were continuing to engage in non-block deals, a song at a time deals, or any other sort of deal?

A I had no knowledge of that.

THE COURT: You had no what?

THE WITNESS: No knowledge of that.

Q But as far as you knew, they had ceased participating in the 3M project altogether, whether on a block or a non-block basis?

A I don't know.

Q In the last sentence in this paragraph you refer to what you call, "our chief concern."

A Yes.

Q That sentence doesn't refer to either policing, the problem of policing after the expiration of the license, the direct license, nor to bulk deals, does it?

A Nor to what?

Q Bulk, block licenses.

A No, it does not.

THE COURT: Would you read me the sentence so I know --

MR. RIFKIND: Yes. Would your Honor like a copy of it?

THE COURT: Yes. If you are going to refer to it that much, I would.

MR. RIFKIND: The sentence I was calling the witness' attention to is: "Our chief concern is that 3M's signing agreements with individual publishers concerning performing rights is inconsistent with the manner of doing buisness which writers prefer and publishers should prefer, that is, to receive performing royalties through performing rights societies, so far as that is legally possible.

Q That doesn't say anything about bulk deals, does it? A

A No, it doesn't.

Q Nor, does it say anything about policing unauthor-

fixed uses.

A No, it doesn't. But it does express or is intended to express one of the major fears that we have when we, as writers, are by-passed in negotiations.

Q To wit? What is that?

A When publishers make deals without consulting the writer. When ASCAP deals in licensing and negotiates a deal, the board of ASCAP is consisting of publishers and writers, so that writers can feel that they are being represented in these negotiations.

But when a publisher makes a deal and we are not consulted, we feel that we are being deprived of a very important interest.

Q Is it therefore true, as a general proposition, what you say here, that is, writers prefer and publishers should prefer to receive performing rights through performing societies? Is that something you believe?

A Yes, it is something I believe.

Q You believed it then and you believe it now?

A I certainly believe it, yes.

Q You said that one of the reasons, or the reason, why you prefer it that way is that writers have a voice in the management of ASCAP. Is that true of the management of BMI?

MISS KEARSE: If the witness is familiar with it.

THE COURT: If you know.

A I don't believe it is the case with BMI.

Q Can you recall having said on occasion that you believe that BMI did not adequately represent the interests of writers, that writers did not have a voice in the management of BMI?

A Are you asking me if I officially took that position, or unofficially made those remarks?

Q Officially, in a letter to BMI.

THE COURT: Are we interested in the witness' state of mind on this point, or the facts?

MR, RIFKIND: I am interested in the facts.

THE COURT: Do you care to ask Miss Kearse for a statement on that?

MISS KEARSE: Certainly, your Honor.

Neither writers nor publishers hold positions on the board or executive committee of BMI.

Q Then I don't understand why, in this sentence, or in your testimony, you said that writers prefer to receive performing rights royalties through performing rights societies. What you really mean, I take it, is ASCAP, not BMI.

MR. TOPKIS: If your Honor please, I submit that

this is all irrelevant. The witness was asked a question what is his opinion as to what writers prefer and publishers should prefer. He answered it. Now what more than that can we possibly have that has any bearing on this case?

THE COURT: I'll allow Mr. Rifkind to ask whether Mr. Lane intended specifically to refer to ASCAP in this sentance or he didn't.

A Yes, it refers to ASCAP.

Q Without reference, however, to this letter, with reference to your testimony just now, that you do believe writers should receive performing royalties through performing rights societies, do you include BMI?

A I can't speak for BMI. I'm not a member of BMI. I don't know how BMI is run, although I am aware that no writer sits on the board of BMI. I'm only interested in, at this point, ASCAP, being a member of ASCAP.

Q There are BMI members of the Guild, are there not?

A Yes, there are.

Q And as president of the Guild, you are interested in protecting their rights as well as ASCAP members, right, were you not?

A Yes.

MISS KEARSE: I object. The witness is no longer

the president of the Guild but Mr. Rifkind indicated this question referred to the past period when the witness was the president of the Guild.

Q Why, Mr. Lane, should publishers prefer receiving performing royalties through performing rights societies?

MR. TOPKIS: Does that make the slightest difference in this case,your Honor?

THE COURT: Probably not.

MR. TOPKIS: The issue here --

THE COURT: Probably not, Mr. Topkis. But until I get to be a little better versed in the situation in the industry, I would like the option of knowing what the attitudes of major figures in the industry are. Nothing that I know accept is immune from or subject to an attack either by motion to strike or comment about its irrelevance later on.

MR. TOPKIS: Good.

Q Do you have the question, Mr. Lane?

A My personal opinion is I would think publishers would prefer having ASCAP collect their performing rights royalties becacause this is a very, extremely complicated, field that ASCAP is in --

THE COURT: May I ask whether, when you used the phrase, and you may not remember the answer to this,

"publishers should prefer," you meant that they had a kind of obligation to prefer, or did you mean that you simply would expect that they would?

A I would expect that they would prefer.

Q You didn't mean "ought"?

A No.

Q Ought to prefer?

A No. It would seem reasonable to me that they would prefer it, for the simple reason that licensing performance rights to thousands of users is a highly complicated field, and ASCAP, or the organization of ASCAP, have experience in this highly --

THE COURT: It is a tremendous convenience?

THE WITNESS: It is a tremendous convenience.

A -- And I think any single publisher, as a single writer, would face an impossible task if they were to do it on their own.

Q Mr. Lane, what was the occasion for your writing this paragraph to the West Coast group? What was the immediate inducement of your making these statements?

A I would imagine we had some typical outburst from our West Coast members asking us to do more than we had done.

Q Do you recall what it is that they asked you to

do?

A Well, generally speaking, I think they wanted us not to deal with 3M, to persuade publishers not to deal with 3M. They wanted us to take legal action to prevent this from happening. But from time to time, as I indicated before, they have proposed actions that we should take that were illegal and ill advised and inappropriate, and after much discussion and legal advice we decided to go our own way.

Q Did they propose action which you understood to be illegal in this context, the 3M context?

A Yes.

Q And what was that?

A To try and take legal action to make publishers not deal with 3M.

Q I am confused.

A To force writers not to give their permission. In other words, what they were suggesting would involve conspiracy not to deal with legitimate people.

Q What aspect of the proposal did you understand to be illegal? I would be shocked if you were advised that anyone suggested that it was illegal to bring a lawsuit.

THE COURT: I think Mr. Lane made it perfectly clear by the end of his last answer that apparently some

people, so far as I recall, people on the West Coast, were suggesting that pressure be brought on individuals not to deal with other people.

THE WITNESS: That's right.

THE COURT: Which for a layman, it seems to me, he understands very well is vulnerable to illegality.

THE WITNESS: Thank you, your Honor. That is really what I'm trying to show.

THE COURT: I wish I could write music as well as you understand the law.

MR. RIFKIND: Your Honor, I would like to ask the witness one question concerning a sentence in the last paragraph on Page 3, the second sentence.

THE COURT: The second sentence, you say?

MR. RIFKIND: The second sentence in the last paragraph.

THE COURT: All right.

Q Mr. Lane, would you look at the sentence?

A Yes.

Q When you referred to "activities which are in violation of the anti-trust laws," were you referring to proposals bearing on the IBM situation?

A I would be guessing if I said that this paragraph was relating to that subject, but it probably was.

Q Do you recall any other proposed activities from the hysterical people on the West Coast that would, in your judgment or in the council's judgment, be in violation of the anti-trust laws?

A Offhand, I don't know.

Q You state there: "Just what programs do you have in mind?" Do you recall whether you got any response to that inquiry?

A I don't remember now.

Q Do you recall, Mr. Lane, whether shortly before you sent PX 135, in July of 1967, you received some communication from the West Coast group relating to the 3M situation?

A I believe we did.

Q Do you recall whether they made any proposals in that communication that related to actions that might be taken?

A Well, isn't this an answer to what you are referring to (indicating)?

THE COURT: Well, it may be an answer, but the question now is whether you remember receiving any, presumably, letter or memorandum and, if so, whether it included any suggestion on their part to which you replied.

A I remember receiving a communication from them --

THE COURT: Written?

THE WITNESS: Written communication, yes.

A -- to which this was an answer.

THE COURT: Do you remember whether any suggestions were included in that about what you ought to do about 3M?

THE WITNESS: I think the plans proposed by the West Coast committee were the plans I'm referring to in this which we decided was illegal; that is, that we should take very firm action to prevent our own members from making a deal, to do everything we could to stop publishers from negotiating.

MR. TOPKIS: Your Honor, I am informed by my colleagues that this communication from the West Coast committee is a document. We all have it. Why in heaven's name have we been taking Mr. Lane's recollection? If we want to know what was said, then let's see it.

MR. RIFKIND: I would be happy to oblige.

THE COURT: All right.

MR. RIFKIND: PX-137.

MR. TOPKIS: This isn't it.

MR. RIFKIND: It is a communication.

MR. TOPKIS: It is not the communication to which --

MR. RIFKIND: Do you want to call my attention to the correct one?

MR. TOPKIS: I would be delighted to.

June 28, 1967.

MR. RIFKIND: Whether it is a communication or the communication, in fact there were several communications and I would like to ask about this one.

Q Does examining PX-137 for identification, and in particular the next to last paragraph, refresh your recollection as to a proposal made by the West Coast committee?

MR. TOPKIS: Again, your Honor, what difference does the witness' recollection make? If the West Coast committee made a recommendation, and it apparently did, then it did, and that ends the matter, doesn't it?

THE COURT: The witness' recollection may be important for the purpose of asking further questions. I don't know.

MR. RIFKIND: I am quite happy to offer 137 in evidence and rest on that.

MR. TOPKIS: For a non-hearsay purpose, I have no objection to it.

THE COURT: All right. For the purpose, in other words, of establishing that the West Coast committee did transmit this message to the East Coast.

MR. RIFKIND: That they made this proposal. Whether any facts in the proposal are true or not, is a matter of

indifference to me.

MISS KEARSE: I have an objection to even evidence of the fact of the proposal on grounds of relevance.

THE COURT: Well, that I may have to decide at a later time, but I'll accept it subject to that determination.

MR. RIFKIND: Under the circumstances, I offer 137 in evidence.

THE COURT: All right. It is received as indicated.

(PX-137 received in evidence.)

Q Having examined 137, Mr. Lane, do you now recall any other proposal made by the West Coast committee to the Guild council?

A Other than what is stated in --

Q No, other than what you have heretofore testified to.

A I see. Well, there is a proposal here suggesting that AGAC, and I am quoting, "explore the possibility of deterring 3M through the trusteeship held by some AGAC members" --

THE COURT: What paragraph are you referring to?

THE WITNESS: The next to the last paragraph.

THE COURT: Let me read it, please.

(Pause.)

THE COURT: All right.

THE WITNESS: Should I continue to read it?

THE COURT: I don't see any point in your reading it.

If you want to ask the witness questions about it, all right.

Q Do you now recall another proposal made by the West Coast committee with respect to the 3M situation?

A Are you referring to the proposal in this exhibit which I am reading now?

Q Yes.

A Yes, I do remember that proposal.

Q Was that proposal considered by the AGAC council?

A All proposals are considered by the AGAC council.

Q Including this one?

A Yes.

Q And what action did the AGAC council decide to take with respect to this proposal?

A We voted it down.

Q Actually, Mr. Lane, did this proposal require any action by the AGAC council?

MR. TOPKIS: Which proposal are you referring to?

THE COURT: I think that is for me to decide just as much as for the witness. It depends how you interpret the phrase, "it was suggested that AGA explore the possibility of doing" so and so.

Q Did you understand, when you examined this proposal and the council considered it, that AGAC members having trusteeships in mechanicals could use those trusteeships to deter 3M without any action by AGAC?

MR. TOPKIS: Well -- I'm sorry.

A I'm really not familiar with the meaning of it. I am not familiar with the trusteeship that they are talking about. I know that this came up for discussion as all proposals come up for discussion, and for whatever reason it was dismissed as not being something we should pursue and therefore it was dropped.

If you are asking me what is intended in this, I think you are asking the wrong person. I think you should call this committee who made the suggestion and see what they were referring to, because I don't know what they were referring to.

Q Did you know at the time that this was voted on by the AGAC council?

A It must have been explained to us by legal counsel. And I don't think we spent much time on it because it was

dismissed. It was voted down and put aside.

Q Now, do you recall receiving any other communications from your West Coast committee with respect to the 3M situation?

THE COURT: You mean other than this?

MR. RIFKIND: Other than this.

THE COURT: Because there has already been an indication that everybody knows there was at least one other.

MR. TOPKIS: Yes. So why not put it in and end the suspense?

THE COURT: I am not interested in whether he remembers it.

MR. RIFKIND: Okay.

PX-123.

THE COURT: You have now handed the witness PX-123 for identification, is that right?

MR. RIFKIND: Right.

Q Mr. Lane, do you recall receiving this communication from the West Coast committee?

A Yes, I do.

Q Who, by the way, is Miss Miriam Stern?

A Miriam Stern was the executive director of the Guild at this time.

Q Was this letter called to your attention by Miss

Stern when she received it?

A Yes.

Q And was it subsequently considered by the Guild council?

A Yes.

Q And did the Guild council take action with respect to it?

A The motion we took was to vote it down.

Q But the Council focused on this recommendation?

A We discussed it in great detail and we voted it down.

MR. RIFKIND: I offer PX-123 in evidence.

THE COURT: As evidence of the fact that the West Coast people made this proposal?

MR. RIFKIND: Exactly.

MR. TOPKIS: No objection for that purpose.

MISS KEARSE: I continue my objection.

THE COURT: All right. Subject to a later determination of relevance, it is received.

(PX-123 for identification received in evidence.)

Q Now, in the middle of the first page on 123, Mr. Lane, there are two indented numbered sub-paragraphs. One refers to violation of the AGAC contract with respect to bulk licenses and the other refers to an effect on the

performing rights structure.

In your discussions at the council, did members of the council or did you express an agreement with Paragraph 2?

MR. TOPKIS: That is to say that the writer should be advised by AGAC?

MR. RIFKIND: Yes.

A No, we did not agree with that statement.

Q Was that part of what you deemed to be illegal activity or activity in violation of the anti-trust laws?

A I don't remember whether it was because of the illegality of it. I'm not a lawyer and I don't remember now the words of our attorney at that particular meeting. I do know that it was voted down.

Q Did you agree with the statement of fact contained in Sub-paragraph 2?

A No, I didn't.

Q You did not think that the 3M situation could have damaging results that could affect the entire performing rights structure?

A No, I didn't.

Q Did other members of the council agree with that statement of fact?

A I can't speak for them.

Q Did they indicate agreement, sympathy with that point of view in your deliberations at the Guild council meeting?

MR. TOPKIS: If I may, your Honor, suppose a couple did and I don't know their names. This is incompetent evidence and it is irrelevant.

THE COURT: I will sustain the objection.

MR. RIFKIND: Your Honor, the last part of the first page of Plaintiff's Exhibit 123 reports agreement taken, action taken, by the West Coast Committee. It seems to me in that sense that this report is a verbal act and, as such, and as part of the reports and records of the AGAC, that paragraph is admissible for the truth of the matter stated.

THE COURT: It is not a part of the report of AGAC in New York necessarily.

MR. RIFKIND: That's where we obtained it.

THE COURT: If you are implying it is admissible under the business records rule, I would not think it would necessarily be. It is a letter received by them. Nobody denies what the character of the document is. The question is whether it is admissible to prove this particular thing.

I have some doubts, but, of course, I don't know whether the defendants are going to try to prove or make believe it is relevant as to whether a couple of dozen people did take the position on the West Coast that

they did. They might be willing to do that but, one, it is not binding on AGAC; and, two, it is not relevant; and, three, it is certainly not binding with the parties here.

MR. TOPKIS: I never went out to the West Coast and asked any of these people. When I learned that, AGAC here, they said, "We want no part of it."

If the plaintiff wanted to prove this happened -- they took the deposition of everybody else and his brother in this case -- they could have taken the deposition of one of these people. Indeed, I think they did. Ned Washington was present at this meeting. They took his deposition. They can offer his deposition on that subject. There may be others for all I know.

No, Ned Washington would be the only one.

That, your Honor, is the way to prove this.

MR. HRUSKA: Let me say something:

We did take Mr. Washington's deposition. He was on our original list. Mr. Washington indicated that he knew next to nothing about the whole 3M incident or AGAC's involvement in it.

Also, your Honor may recall that there was a motion made in this court to limit discovery to the number of people who were on a deposition list as of the time of that motion. Your Honor granted that motion to the extent

that we were confined to the people on that list, and there was a ground rule entered about further depositions. I would have no problem about taking the deposition of every person if this case were opened up for that purpose.

THE COURT: It would seem to me you would only take one deposition and that should be the one who wrote this document.

If this becomes in my mind a significant factor, I will give you permission to do that.

In the meantime I deny the application that the exhibit be received as evidence of the fact that the persons indicated to be present unanimously pledged themselves --

MR. TOPKIS: Lest your Honor proceed on a misapprehension, following the ruling of your Honor, which Mr. Hruska reversed, Mr. Hruska asked our leave to take the deposition of Mr. Berman. We acceded. He asked leave to take other depositions --

MR. HRUSKA: Mr. Berman was on the original list, your Honor.

THE COURT: I know we have all been under pressure. I am sure as the trial unfolds you may find things that could have been more perfectly accomplished. We will have to find a way to do them if I consider them

to be relevant as we go along.

MR. RIFKIND: I want to clarify the grounds of my submission. It does seem to me that a pledge of a committee falls into the category of things like a decedent's statement when he destroyed his will: He says, "I mean to destroy my will (indicating)."

THE COURT: That's an interesting argument, Mr. Rifkind, but there are two points which it seems to me occur right away.

First of all, the word "pledge" can be used in a great many different ways and I have no indication of just what quality the word has here.

Secondly, after all, I have got this man writing this letter alone and it is one thing to hear him say under oath that all these things happened or even for him to say that everything that was stated in the document actually occurred, and it is another thing for me to believe that it is true merely because he wrote it. I certainly don't mean to imply that I don't believe it. I am neutral.

THE WITNESS: May I add something, which goes with what you have just said?

THE COURT: Yes.

THE WITNESS: We have had occasions where we have received letters with a list of names of people who

attended the meeting, but they were totally unfamiliar when they were faced with the letter that we received when they came to New York. that thishad ever taken place.

THE COURT: Of course that may indicate their forgetfulness or a little hanky-panky. I don't know which.

BY MR. RIFKIND:

Q Mr. Lane, I see the name Vic Mizzy on this list of names. Who is Mr. Mizzy? Do you know?

A He is a member of AGAC. He is a composer. I think he scores firms for television,mostly.

THE COURT: Gentlemen, I think at this point we will take a recess.

(Recess.)

THE COURT: You may proceed.

BY MR. RIFKIND:

Q Did you ever have occasion to write Mr. Mizzy concerning the 3M situation?

A I don't remember whether I wrote to Vic Mizzy, but I might have, in writing to the West Coast Committee.

Q Looking at Exhibit 134 for identification, does that refresh your recollection that you had occasion to write Mr. Mizzy, referring to paragraph No. 2, concerning the 3M situation?

A Yes.

Q Do you recall the occasion for this letter?

A Can I take a moment to read this?

Q Certainly.

A (Pause) Yes. I remember this.

Q What was the occasion for this?

A Communication to Mr. Mizzy.

MR. TOPKIS: Your Honor, again, aren't we wasting time?

The letter says what the occasion was and the occasion was another letter referred to. We have both documents. Can't they be offered and go on to something else?

THE COURT: Is that correct?

THE WITNESS: As I remember it, yes.

MR. RIFKIND: I offer Plaintiff's Exhibit 134 in evidence.

MR. TOPKIS: For the same purpose, that is that this witness --

THE COURT: This is a letter from the witness and nobody else. If Mr. Rifkind wants to question him about the exhibit he can.

MR. RIFKIND: I do.

THE COURT: It is presently admitted for the purpose of establishing that Mr. Lane wrote the letter to

Mr. Mizzy.

MR. RIFKIND: That's stipulated to?

MR. TOPKIS: Yes, sir.

BY MR. RIFKIND:

Q You did write this letter, did you not?

A Yes, sir.

MR. TOPKIS: We will stipulate to it and he has testified to it.

MISS KEARSE: I still have an objection to relevancy.

THE COURT: As to the contents or as to --

MISS KEARSE: As to the contents and as to the fact that Mr. Lane wrote the letter.

THE COURT: As to the contents I can't tell until I read it over.

As to the fact that he wrote the letter about 3M to one of the members, I think I would overrule you.

MISS KEARSE: It is our position it is a hearsay statement as well as being an irrelevant hearsay statement.

THE COURT: I have ruled several times with regard to that claim. I am not accepting these exhibits, at least under the present circumstances, for the purpose of establishing the facts contained therein, but only for the fact in this case that Mr. Lane wrote the letter and it

is a basis for questioning with regard to the contents of the letter.

It will be received.

Do you claim the national situation has anything to do with this?

MR. RIFKIND: No.

THE COURT: Except for the paragraph on the third page going into the national situation and under the limitation indicated, the exhibit is received in evidence.

xx (Plaintiff's Exhibit 134 received in evidence.)

BY MR. RIFKIND:

Q Mr. Lane, at the outset you said that you had stated the West Coast Committee report on this meeting of May 11,1967. Had that report been forwarded to you by Mr. Mizzy?

MR. TOPKIS: Objection, your Honor.

THE COURT: Sustained.

Does it make any difference if he got it?

MR. RIFKIND: It was suggested by Mr. Topkis shortly before and, indeed, by the witness to some extent, that he may have been off on an aberration of his own.

THE COURT: They didn't say they didn't get the report from the West Coast. They said they can't vouch

for the truth of the contents of the report.

MR. RIFKIND: What I would like to establish is that there are, according to the documents, many of the members of the West Coast Committee who were, in fact, quite concerned about the 3M situation.

THE COURT: You may be able to establish that. I don't think that that is dependent on the question as to whether Mr. Mizzy was the one who sent it. Maybe that indicates some personal interest on his part.

Do you remember whether you got the report from Mr. Mizzy?

THE WITNESS: I don't remember that specifically, but I am writing to him, so I imagine that is what happened.

Q Is it your recollection that Mr. Mizzy was, indeed, concerned about the 3M situation and somehow or other communicated that concern to you?

MR. TOPKIS: I think I will object to any statement by this witness about Mr. Mizzy's concern on the ground it would be hearsay. I can't cross-examine Mr. Mizzy.

THE COURT: I think that's carrying the hearsay rule too far. Mr. Mizzy expressed a state of mind.

Q Did you understand at the time you wrote Plaintiff's Exhibit 134 that Mr. Mizzy was among the members of the West Coast Committee who were particularly concerned about the 3M situation?

THE COURT: I would rather narrow this.

Had Mr. Mizzy expressed to you any concern prior to your writing this letter of May 18th?

THE WITNESS: I don't remember, not having the letter in front of me, whether he was expressing his own concern or the concern of others on the West Coast. I believe he was the temporary chairman at that time of the West Coast Committee. He can be reporting something that other people felt about this situation other than his own opinion. I don't know.

MISS KEARSE: Your Honor, to the extent that he was expressing the concern of other people I think we have the problem of double hearsay.

THE COURT: I agree. This is not competent for the purpose of expressing the concern of other people. It is only competent to show he wrote the communication. Where we go from there is up to Mr. Rifkind.

BY MR. RIFKIND:

Q Mr. Lane, referring to the middle of the paragraph numbered 2, you refer to a meeting attended by Herman Finkelstein of ASCAP and Alan Arrow of the 3M, witnessed by Eddie Elisco and me, i.e. Mr. Lane; is that the meeting you referred to earlier in your testimony in which you said you brought 3M and ASCAP together?

A Yes.

Q You go on to say that Eddie -- is that Mr. Eliscu?

A Yes.

Q Eddie and I were disturbed by some of the things said at that particular meeting. We arranged to meet with Stanley Adams at the ASCAP office.

What was it that disturbed you at the meeting between 3M and ASCAP, Mr. Finkelstein and Mr. Arrow?

A I couldnot say today that was actually said at that meeting, but we were disturbed, just generally speaking; we were disturbed at what we thought was a rather arrogant or superior attitude shown by Mr. Finkelstein at the beginning of that meeting.

I must say that I was disturbed, personally disturbed, by this, and so was Mr. Eliscu.

I have grown quite fond of Mr. Finkelstein. I think I know him a lot better since the period I am referring to.

THE COURT: Who is Mr. Eliscu?

THE WITNESS: He is a writer who followed me as president of The Guild. He is an officer of The Guild.

Q Why was it you were disturbed by Mr. Finkelstein's manner, attitude?

A We were very serious as to what we were attempting

to do, that is, bring two parties together, one who represented our interests with a potential customer. We wanted that meeting to be taken very seriously.

We were disturbed by what we thought was a less than serious attitude on the part of Mr. Finkelstein.

ASCAP had been through a similar, we thought, situation many years before this when Gene Buck was president of ASCAP.

THE COURT: I think we are getting into deep water.

THE WITNESS: I was only expressing the reason for my concern.

THE COURT: That aspect of your reason I think is irrelevant to our case.

Q Were you apprehensive that Mr. Finkelstein's attitude prejudiced the likelihood of a rapproachment between 3M and ASCAP?

A That's what we felt.

Q Did you feel that Mr. Finkelstein's attitude was one that indicated ASCAP could sit back and people would just knock on their door and come in and he didn't have to budge?

MISS KEARSE: Objection, your Honor.

THE COURT: Sustained.

If you want to ask him what Mr. Finkelstein said, that might be useful.

MR. RIFKIND: I am trying to find out what concerned Mr. Lane and his colleague, Mr.Eliscu, so much that they want to see the president.

THE COURT: He made it clear to me in general terms. I think I understand. He said that Mr. Finkelstein behaved in such a way that he was worried it might interfere with rapprochment with 3M, and he wanted that to take place.

Q Let me show you Maintiff's Exhibit 133 for identification.

THE COURT: Is this another agreement that counsel may agree on?

MR. TOPKIS: It is a report of a meeting of the West Coast Committee of May 11, 1967. That is the document that the witness testified he had received and --

THE COURT: Your position is the same?

MISS KEARSE: Yes.

THE COURT: Subject to your general objection of irrelevance it will be received for proof of the fact that the minutes -- it looks like the minutes were to Mr. Lane.

MISS KEARSE: Your Honor, another problem with this document is that it does not indicate who prepared

it.

MR. RIFKIND: I should explain, your Honor, that AGAC's counsel, at the time we accepted these documents, requested, and we concurred with them, the process of excerpting their minutes, therefore what we have is a set of relevant excerpts rather than the whole document.

THE COURT: So far as authenticity is concerned --

MR. RIFKIND: That's stipulated.

MR. TOPKIS: Yes, your Honor.

THE COURT: It is stipulated these are the minutes or the equivalent of the minutes?

MR. TOPKIS: Yes.

THE COURT: I don't see what difference it makes unless Mr. Rifkind is going to try to prove that it indicates a certain persons point of view. That's another matter.

I think the minutes are intended to indicate what occurred at a meeting of the group, and if that involves also the expression of a collective point of view, to record that as well.

MISS KEARSE: My understanding that your Honor was not admitting this for the truth of what is stated here.

THE COURT: I am not.

Q Calling your attention to the first sentence of

the second paragraph --

THE COURT: One moment. May we mark the original received in evidence as indicated.

xx (Plaintiff's Exhibit 133 received in evidence as indicated.)

BY MR. RIFKIND:

Q Calling your attention, Mr. Lane, to the first sentence in the second paragraph, does that refresh your recollection as to whether or not prior to your letter to Mr. Mizzy of May 18, 1967, you, in fact, had some communication with him?

THE COURT: The first sentence of the second paragraph?

MR. RIFKIND: Yes.

A Your question is?

Q In the light of that statement, did you now recall that prior to May 18th Mr. Mizzy not merely wrote you but, in fact, came out to the East Coast and visited with you or visited with the council of AGAC?

A Mr. Mizzy has visited the East Coast on a number of occasions. I cannot remember from these notes what particular subject was discussed or what was involved.

Q Do you recall whether when you wrote the May 18th letter, Plaintiff's Exhibit 134, youhad, in fact,

been hand-delivered the West Coast Committee report by Mr. Mizzy?

MR. TOPKIS: Objection, your Honor.

What difference does it make whether it was hand-delivered or sent by smoke signals?

THE COURT: Mr. Rifkind is trying to establish a personal interest on the part of a number of people, and I will allow him to do so.

Do you understand the question?

THE WITNESS: I don't think I do.

THE COURT: Now that you see this statement here, which may or may not be correct, of course, there is something here which says that after heated discussion Vic Mizzy volunteered to go to New York. That's May 11. On May 18th this was written. Mr. Rifkind is asking whether reading about this alleged volunteering of Mr. Mizzy you now recall that Mr. Mizzy came to New York and told you about the meeting of the West Coast Committee or perhaps gave you a copy of these minutes? The only question is whether you now recall that.

THE WITNESS: No, I don't recall that.

BY MR. RIFKIND:

Q We have referred several times now, Mr. Lane, to a letter that you sent out to publishers concerning the 3M situation.

A Yes.

Q I want to show you Plaintiff's Exhibit 27 for identification, 3M Plaintiff's Exhibit 27, and ask you whether that is a letter to which you have repeatedly referred?

A Yes, it is.

THE COURT: You say it is?

THE WITNESS: Yes, it is.

Q Do you know approximately how many publishers this letter was sent to?

A No, I don't.

Q Do you recall whether the AGAC council instructed you, as president, to send out this letter to publishers?

MR. TOPKIS: If your Honor please, I suggest that the more proper question would be: how did you come to send this letter?

THE COURT: Sustained.

Q Mr. Lane, how did you come to send this letter?

A This letter was recommended -- a resolution was made by the council of AGAC to send the letter to the publishers alerting them of our rights under our contract with them that they should be careful not to violate those rights.

Q When you say "to the publishers," to which

publishers do you refer?

A To all publishers with whom we have an agreement, signed our basic agreement.

THE COURT: "We" being The Guild?

THE WITNESS: "We" meaning The Guild.

Q I think you testified before that that was, in substance, all major publishers?

A Yes. I don't know the number of them. A letter would be drafted and our executive director would send it out. I didn't have any list, personally, of the publishers.

Q You signed it?

A Yes

MR. RIFKIND: Your Honor, I offer 3M Plaintiff's Exhibit 27 in evidence.

MR. TOPKIS: On the same understanding, no objection; that is to say, it is received for the proof of its having been sent and nothing more than that.

MISS KEARSE: Same objection, your Honor.

THE COURT: All right.

xx (3M Plaintiff's Exhibit 27 received in evidence.)

BY MR. RIFKIND:

Q What, Mr. Lane, is The Guild's objection to bulk or block licensing?

MR. TOPKIS: I object to that question, your Honor.

I take it that the question seeks to explore the underpinning for the provision of the AGAC basic agreement relating to block licensing. If Mr. Lane helped draft that basic agreement and that's what the question seeks to explore, I have no objection.

THE COURT: I don't think the question is restricted to that narrow scope. I think it has to be established he understands the policy of AGAC and has participated in discussions on that on the executive level and then he can tell me what they are.

Have you participated in discussions with regard to block licensing?

THE WITNESS: I have participated in some discussions involving that, yes.

THE COURT: Are you aware of the policy of The Guild as to that subject?

THE WITNESS: Yes, I am.

THE COURT: Tell us what you understand that policy to be, or during this period.

THE WITNESS: We, The Guild, is opposed to block licensing or block or blanket deals without the consent of the writer. We have had a number of experiences with

publishers who will use two or three of their outstanding songs in their catalog to get rid of, so to speak, songs that could not stand on their own in making a deal. They will accept advances based on the great songs, those two or three, and never distribute the money to all the writers according to value.

What I am really referring to here is when a publisher makes a deal with an affiliate of theirs in a foreign country to publicize their catalog, they will get an advance from the foreign company and because whatever the advance is is not specified, so much for this song and so much for that song, we, as writers, are entitled to 50 per cent of that advance, and we don't get any of it because he pockets the money and does not seek our approval for that kind of deal.

I was not a party to this going into our minimum basic contract. I had nothing to do with this. This happened many years before. It was a prohibition of this kind of practice.

Q Does the policy oppose block licensing or oppose block licensing without the writer's, individual writer's, assent?

A It opposed it without thewriter's consent.

THE COURT: There are some writers who have given

their consent?

THE WITNESS: No. I don't know.

THE COURT: You don't know one way or the other?

THE WITNESS: I have never heard of a writer giving his consent.

Q Do you know why that is?

A No.

Q Does it have to do with the terms of payment with respect to block licensing?

A I don't know.

Q Do you see a difference between bulk licensing granted by a publisher and a blanket license granted by ASCAP?

MR. TOPKIS: Objection.

A In this respect.

MR. TOPKIS: Objection, your Honor.

THE COURT: I will sustain it.

If anybody is the expert beyond the ability of lawyers to argue that point I don't believe that Mr. Lane claims to be such. I think the way to try to get at that point is to put to the Court what the facts are in terms of licenses and any procedures which might cast light on it, and then to argue from there what it all adds up to.

MR. RIFKIND: It does seem to me to be relevant

to know whether a representative writer perceives a difference in a system which he is participating in, ASCAP, and a system that he is vigorously resisting, bulk licensing by publishers. Maybe there is an obvious distinction. I must admit it misses me.

THE COURT: I would assume his bread is buttered on one side in this one situation and on another side in another situation.

What, really, I am wondering about is whether Mr. Lane's personal perception can be relied upon as being proof of a general frame of mind.

MR. RIFKIND: Mr. Lane was the president of perhaps the majormost important writers' organization in the United States. It is really from that official capacity that he wrote this letter of November 15, 1965, expressing their views as to licensing.

THE COURT: You can ask him what the organization's attitude was, and I don't mean to say that I would not be personally interested in what Mr. Lane's attitude is, but I don't know what it proves except as to his own personal attitude.

Q Has The Guild ever taken a position opposed to blanket licensing by ASCAP?

A No, it has not.

Q Or BMI?

A I don't know about BMI, but we have never taken a position with respect to ASCAP.

Q Let me show you, Mr. Lane, 3M Plaintiff's Exhibit 31. I believe there is no dispute as to the proposition that this is the current edition of the uniform popular songwriters' contract promulgated by The Guild?

MR. TOPKIS: I believe it is stipulated, your Honor. In any event, there is no question about it.

Q Is this the agreement, Mr. Lane, that The Guild has agreed, with a substantial number of publishers' companies, would be used in dealings between those publishing companies and The Guild members?

A Yes.

Q Is this the agreement to which you referred in your letter of November 15, 1965 marked 3M PX-27?

THE COURT: The letter to the publisher.

MR. RIFKIND: The letter to the publisher, exactly.

A Yes.

THE COURT: I take it you want to zero in on the paragraph.

MR. RIFKIND: Yes. I call your attention in the first instance to Paragraph 4J.

MISS KEARSE: Your Honor, has this been offered or admitted in evidence yet?

MR. RIFKIND: I will offer it.

THE COURT: You do offer it?

MR. RIFKIND: I do offer it at this time.

MR. TOPKIS: No objection.

MISS KEARSE: I object on the grounds of relevance.

THE COURT: Overruled. Received in evidence.

(Exhibit 3M PX-31 received in evidence.)

THE COURT: Now we are talking about 4J, entitled "Block Busters."

Q Is that one of the paragraphs you were referromg to in your letter to the publishers on November 15th?

A I believe so.

Q I point out, Mr. Lane, that under that paragraph the participating publisher agrees that he will not include the composition which is the subject of the agreement in any bulk or block license without the consent of the American Guild of Authors and Composers on behalf of the writer in each instance.

MISS KEARSE: Is there a question?

MR. RIFKIND: There is no question, Miss Kearse.

Q You have stressed that it was the policy of the Guild to oppose block licenses without the consent of the writer. You tell us what the reason is for the provision that it shall be the consent of the Guild on behalf of the writer.

A The language used in this contract is not my language.

Q I appreciate that.

A This was developed and created by legal counsel long before I took an active part in it.

THE COURT: May I shorten it by asking whether you know if the Guild is obligated to give its consent in the event that the writer tells it to?

In other words, is it merely the agent for transmitting the writer's position or can it stand between the

writer and the publisher?

THE WITNESS: I would put it this way: I would say that the Guild would be representing the best interests of the writer. But I'm not --

THE COURT: You don't know if it's obligated --

THE WITNESS: No, I don't.

Q In that connection, I call your attention to the next paragraph, 4K, which is also referred to in your letter of November 15th to the publishers, and which doesn't have such a provision for the consent of the Guild on behalf of the writer but only to the consent of the writer in each instance. And I wonder if you know what the reason for that distinction is.

A Again, this is not my language and therefore it is hard for me to answer that. It may be interchangeable, the Guild, meaning "writer." I don't know. It would seem that way to me.

THE COURT: Wouldn't Mr. Kellman, if that is his name, be the witness that we would need on this?

THE WITNESS: Mr. Kellman was not the counsel at this time, at the time this contract was drawn up. I think the attorney for the Guild was John Shulman. I think it was him.

Q In fact, Mr. Lane, was not this agreement originally

negotiated in 1947, but renogiated or revised in some respects in 1969?

THE COURT: Which version is this?

MR. RIFKIND: Judging from the copyright notice at the top of the first page just under the heading, it says, "Copyright 1969 AGAC."

THE WITNESS: Where does it say that? Mine says "1948.)

Q And right under that?

A Oh, you are right, 1969, yes.

I imagine there was some modifications to the contract.

Q This language was not changed at that time, to your knowledge?

A I wouldn't know.

Q Have you ever heard any discussion, has any member of the Guild, has the council of the Guild, council in either sense, expressed a rationale for the distinction between 4J and 4K?

MR. TOPKIS: Your Honor, I confess again I am lost. 4K relates to television. 4K has no restriction. AGAC is not involved. So what difference does the distinction make?

THE COURT: I think unless we can get a witness --

I am assuming there may be a difference, even assuming there may be a difference, unless we can get somebody who actually participated on a professional level with the drafting of this, I think we have to let it speak for itself. Whatever we can make of it, we can make of it. It may be that, as you point out, the answer is that one is television and the other is something else. I don't know.

There is too much type for me to absorb so quickly.

MR. RIFKIND: It seems to me the question was whether Mr. Lane who had been president of the Guild was aware of the rationale for the distinction between 4J and 4K.

THE COURT: The answer is he is not aware.

Q You expressed apprehension in your letter to the publishers that publishers have violated, or may have violated, provisions of the uniform popular songwriters' contract.

MR. TOPKIS: Where are you referring to, please?

THE COURT: Yes. Do you want to refer to the language?

Q I call your attention to the fifth paragraph: "In our opinion, the agreement as we know it which the

publisher signs with 3M," et cetera.

THE COURT: All right.

Q Did you consider, Mr. Lane, whether an appropriate means of dealing with that threatened or actual violation of the contract by a publisher was to sue him?

MR. TOPKIS: Was what?

THE COURT: To sue him.

MR. RIFKIND: To sue him for breach of contract.

MR. TOPKIS: If your Honor please, I submit that that is totally irrelevant. Suppose he did consider it and suppose he didn't consider it? What difference does it make in this lawsuit, in which this whole business is supposed to realte only on some disinclination, I suppose, and in which the fact is that 3M got all the music it needed?

MR. RIFKIND: That is hardly a fact, it appears or record.

THE COURT: I don't take any statement of counsel as being a fact or record. What is the alleged significance of whether they thought of suing or not?

MR. RIFKIND: Well, your Honor, there have been a whole slew of proposals for dealing with the 3M situation that have been coming across the council room of AGAC: boycotts, trusteeships of [illegible]anical rights, and so on.

One simple, obvious, straighforward,obv ously legal method of dealing with the situation in light of Mr. Lane's letter was to sue a publisher.

THE COURT: I think one very obvious thing to do was what they did, which was the right to say, "We think you are violating the contracts."

MR. RIFKIND: I appreciate that.

THE COURT: And I think that is sufficient. I don't think I need to explore whether there are other possible good ways they could have done it, too. So I sustain the objection.

MR. RIFKIND: I submit an offer of proof that if the witness were asked he would testify that it never crossed his mind or the mind of any one of the council to his knowledge that they might bring suit under the AGAC contract.

THE COURT: What would that establish, then, if you did prove that?

MR. RIFKIND: That would establish, in my submission, your Honor, that their council did not think that this was an effective means of deterring publishers from dealing with 3M.

THE COURT: Since I couldn't reach that conclusion

on that proof, I won't accept the proof.

Q Mr. Lane, I call your attention to Page 2, the next to the last paragraph on that page.

THE COURT: Still the letter to the publishers?

MR. RIFKIND: Yes, 3M PX-27.

MR. TOPKIS: Again the paragraph?

MR. RIFKIND: Next to last on Page 2, "The most disturbing element."

MR. TOPKIS: Right.

Q The next to last sentence in that paragraph says:

"Further, by by-passing the writers they are demonstrating a woeful lack of regard for the customary loyalty and good will of songwriters."

Does that deal only with the block licensing or does it deal with the more general problem referred to in the first sentence in that paragraph, that 3M is dealing for performing rights directly with ASCAP publishers, ignoring completely the writers individually and the performing rights societies of which the writers are members?

MR. TOPKIS: I suggest, your Honor, that the language couldn't be clearer.

THE COURT: Well, whether it could be clearer or not, I suppose Mr. Rifkind is entitled to ask the witness

a question as to what he meant by it. But that seems to me about the limit of what he can be asked.

When you wrote, "Further, by by-passing the writer they have demonstrated a woeful lack of regard for the customary good will of songwriters," what did you mean?

THE WITNESS: I believe we meant that writers would be threatened by having their rights deprived if they weren't considered in these negotiations. When 3M would deal with ASCAP, since there are a number -- writers would have an equal voice with publishers in these arrangements, we would feel that our rights were protected.

THE COURT: And what did you mean by "customary loyalty and good will of songwriters"?

THE WITNESS: I think what is meant here is that publishers know how writers feel, and if they went ahead ignoring long-established relationships, I think we felt that this would lead to future problems, the relationships wouldn't be as friendly.

THE COURT: Okay.

Q Mr. Lane, as you intended that sentence, was that meant to be true whether or not the licenses granted by the publishers were block licenses?

A Whether or not, if the writers were not considered

and consulted.

Q Was that because of provisions of 4K of the uniform popular songwriters contract or for other reasons?

MR. TOPKIS: I think that question has been asked and answered before, your Honor.

THE COURT: I thought it was just answered by the last answer, which, if I understand it, was that this was intended to convey that you would be unhappy whether they were talking about block licenses or they were not talking about block licenses.

THE WITNESS: That's right.

Q 4K is the paragraph dealing with novel post-1937 licenses and I was trying to establish that that wasn't a consideration either; there is an overriding unhappiness.

THE COURT: There is a what?

MR. RIFKIND: There is an overriding unhappiness with direct licensing that has nothing to do with either 4J or 4K.

THE COURT: I don't think you were tying your last statement to any particular provision of the contract, were you?

THE WITNESS: No, I wasn't.

I think the main point here, if I could cut through, whenever writers were not consulted, we would not be

happy with that situation.

Q Mr. Lane, are writers consulted in each instance when a publisher grants a mechanical rights license?

MR. TOPKIS: Is this meant to be impeachment of the witness, your Honor?

MR. RIFKIND: No. It is an inquiry.

THE COURT: Overruled.

Will you read back the question, please?

(Question read.)

A No. A writer is not consulted. We are talking about a rate which is established by law, the copyright law, limiting what a publisher can ask for in terms -- for mechanical rights, two cents a song. The publisher gets one cent and the writers divide the other cent. No, we do not seek the consent of a writer in that kind of negotiation.

Q Suppose the publisher grants a mechanical rights license for less than two cents.

A We don't like it, but there is nothing we can do about it.

Q Have you ever written publishers saying that you must not grant mechanical rights licenses for less than two cents without the writer's agreement, consent, in each instance?

A No.

Q Are writers consulted in each instance when publishers grant performance rights for theatrical motion pictures?

A I don't know.

Q Are writers consulted in each instance when the publisher prints and distributes, sells sheet music?

MR. TOPKIS: I'm sorry. I don't understand that that question.

MR. RIFKIND: Is the writer consulted as to the price at which the publisher will sell sheet music?

MR. TOPKIS: As a matter of trade practice? Is that the question?

MR. RIFKIND: Yes.

A No. But the rate that a writer receives for sheet music is established when he signs a contract.

THE COURT: With the publisher?

THE WITNESS: With the publisher.

Q That is, the percentage of the publisher's receipts that the writer obtains?

A No. If it's three cents a copy or six cents a copy, that is established by contract that a writer would receive.

Q Do the publishers consult with the writer and get the writer's consent in each instance that they grant synchronization rights licenses?

MR. TOPKIS: To --

MR. RIFKIND: Again, as a matter of trade practice.

MR. TOPKIS: Motion picture, television? What?

MR. RIFKIND: I'll take them one at a time. Motion pictures.

MR. TOPKIS: As a matter of trade practice or the witness' familiarity? It seems to me we are asking very broad questions.

Q Take trade practice within your knowledge.

A I don't know.

Q Television synchronization licenses?

A I don't know. I personally don't have that experience because I'm not involved. I don't know what the writers other than production writers do in that situation.

Q During the years of your activities at the Guild, when you were president or on the council, did you or did the Guild ever send a letter to publishers saying "You must not grant any of these sort of rights without the writer's consent in each instance."?

A Grant any of what rights?

Q Synchronization, performance, mechanical.

A If I remember correctly, I think that NMPA, the publishers organization, and our Guild developed a minimum price range in which songs could be licensed to avoid delay in issuing these licenses. I think there is a schedule that exists whereby the publishers would not have to consult us or consult the writer each time a deal was made.

Q And that was negotiated between the NMPA and AGAC?

A And AGAC.

Q Now, Mr. Lane, did you receive any response to your letter of November 15, 1965 to the publishers?

A Well, at the time you took my deposition you showed me a letter from someone which complained violently against the letter I had written. But I don't know this person and there is nothing I can say about it.

Q Any other response that you now think of?

A I don't remember.

Q Did you have any communications with any publishers after you sent out this letter concerning the subject matter of the letter?

A I don't remember.

THE COURT: Did you write--if you can remember, when you sent the letter to the publishers, did you send it

to the NMPA too?

A I don't think we sent it to NMPA but to publishers who are in that organization.

THE COURT: I was wondering, in other words, if there was any official answer to you on the part of NMPA.

THE WITNESS: No, I don't remember if we received any such letter.

THE COURT: I suppose you would know about it if there was one.

Q Did you communicate with Mr. Arrow about the letter? I think you indicated before that he was disturbed about it.

A I think Mr. Arrow communicated with us.

Q And what did he say to you?

A He didn't say it to me. He spoke to Miriam Stern.

Q What did Miss Stern say to you?

A Well, --

THE COURT: About what Mr. Arrow said?

MR. TOPKIS: I object to that, your Honor.

Q Did you ever discuss the letter with Mr. Arrow directly?

A As a result of whatever he said to Miriam Stern, I expressed a desire to meet with him to explain our position,

which we did when we did have that meeting.

Q To whom did you express that desire?

A To Miriam Stern, who relayed it to Mr. Arrow. And this resulted in a meeting at our Guild's office with Mr. Arrow and, I think, a gentleman named Harold Orenstein.

Q And at that meeting what did Mr. Arrow have to say or Mr. Orenstein?

MR. TOPKIS: I'm sorry. Who is that?

THE COURT: Who is Mr. Orenstein?

MR. HRUSKA: Mr. Arrow's partner, your Honor.

THE COURT: Partner?

MR. HRUSKA: Yes, and worked with Mr. Arrow in 3M matters.

THE COURT: Except to anticipate questions of connection with what Mr. Arrow may testify, I don't see why what Mr. Arrow said would be admissible.

MR. RIFKIND: It seems to me Mr. Arrow's view as to the impact of this letter as expressed to Mr. Lane is relevant in assessing the impact of the letter.

THE COURT: He is going to be here as a witness, isn't he?

MR. RIFKIND: That is true.

THE COURT: Then let's ask him.

MR. RIFKIND: Furthermore, there are other

developments involving Mr. Arrow and Mr. Lane --

THE COURT: You can go ahead and ask Mr. Lane what he did as a result of what Mr. Arrow said and then fill in the chink when Mr. Arrow is here.

Q As a result of your conversation with Mr. Arrow and Mr. Orenstein -- was that, by the way, just the three of you or were there more people present at that meeting?

A I believe there were more people present. I think Miriam Stern was present.

Q Did Mr. Arrow and Mr. Orenstein attend a meeting of the AGAC council?

A No, I don't think so. I think it probably was the executive committee meeting.

Q What happened thereafter as a result of your communication with Mr. Arrow?

A We explained what our concerns were in 3M dealing with publishers without consulting writers and we offered our services as a friend of both parties - that is, of 3M --

THE COURT: Is this what you referred to in the early part of your testimony?

THE WITNESS: Yes.

THE COURT: And as a reuslt of that you actually brought about a meeting between Mr. Arrow and the ASCAP

people?

THE WITNESS: That's correct.

Q Mr. Lane, can you give us your best recollection of what transpired concerning 3M at the meeting you have described as being attended by Mr. Finkelstein, Mr. Arrow and yourself?

THE COURT: I thought we had been through that. I certainly remember expressions of concern by Mr. Lane about Mr. Finkelstein, and so on. Is there anything in particular you want to zero in on?

MR. RIFKIND: Yes. What I would like to determine is what other than an expression of arrogance Mr. Finkelstein had to say.

THE COURT: All right.

A I couldn't possibly remember what was said so many years after this meeting.

THE COURT: How long a meeting was it?

THE WITNESS: Approximately a half hour or forty five minutes, something like that.

THE COURT: Well, I take it you remember the subject matter of the discussion.

THE WITNESS: I remember the subject matter. As I opened the meeting --

THE COURT: This was at your office?

THE WITNESS: At our Guild's office. I opened the meeting by expressing our desire to have both parties meet and agree to sit down and negotiate in good faith, and we were the friends of both parties, and this is what we were anxious to see be done.

I can't remember the conversations or the things that were said between Mr. Finkelstein and Mr. Arrow. I can remember the end -- the feeling I had at the end of the meeting, where they both assured me that they would meet and they would carry on negotiations.

THE COURT: All right, Mr. Rifkind.

BY MR. RIFKIND:

Q Mr. Lane, let me show you PX 128 for identification. Do you know what this document is?

A You explained this to me at the time you took my deposition.

Q Is it your present recollection, Mr. Lane, that at that meeting with Mr. Finkelstein Mr. Kellman, counsel for AGAC, took notes and that he subsequently prepared and gave you this memorandum of that meeting?

A You are asking me if I --

THE COURT: If you recall that.

THE WITNESS: Do I recall that? Frankly, I did not recall it.

Q Do you now recall it?

A Yes.

Q Does this help to refresh your recollection as to what was said at the meeting?

(Pause)

A I am under oath and I can't deny that these notes are accurate, and yet I can't say they are not accurate. I don't remember.

THE COURT: In other words, it doesn't refresh your recollection.

THE WITNESS: No, it does not.

Q Let me call your attention to some particular phrases and ask if you recall those particular episodes.

On page 3 --

MISS KEARSE: Your Honor, I object to reading this. It is not in evidence.

THE COURT: I think he could ask whether certain words refresh his recollection.

Mr. Kellman, is he alive and available?

THE WITNESS: Yes, he is.

THE COURT: Why don't you call him? If you are interested in proving what happened at the meeting, why don't you call in the man who took the notes and made this memorandum? He certainly ought to remember. If he doesn't,

I guess we'll just have to figure out what to do.

MR. RIFKIND: I do submit, your Honor, that this is on its face a contemporaneous observation.

THE COURT: That may also be true. Maybe it is part of the res gestae or something else I haven't thought about. But if you want to go into it in depth or question a live witness about it, apparently there is no dispute, is there, Mr. Lane, that you do remember that Mr. Kellman did take notes that day?

THE WITNESS: Yes.

THE COURT: You do remember that the day after, -- and apparently I misread the first sentence, it appears to be dated the day after the meeting -- a day after the meeting or two days after the meeting you received this memorandum from him?

THE WITNESS: I don't remember when I received it or if I received it. I really don't remember.

THE COURT: You don't remember receiving it?

THE WITNESS: No, I don't remember that at all.

MR. RIFKIND: It is stipulated, I believe, that it was sent and received by --

THE COURT: Is that so?

MR. TOPKIS: If Mr. Rifkind says so, I'm sure it is right, your Honor.

MR. RIFKIND: Yes.

MISS KEARSE: I would like to check my notes on that.

MR. RIFKIND: It is stipulated in the pretrial order that every document marked at a deposition is deemed to have been sent by the author and received by the recipient unless someone gives notice of that by April 26th.

MISS KEARSE: And, indeed, on April 26th we gave you notice that as to this document that stipulation should not apply.

THE COURT: Well, I think it is so late in the day that we should terminate now and unsnarl the mechanics of whether it is stipulated or not stipulated. But if it is key, I recommend that you call Mr. Kellman and get him. I don't see why his testimony should be very long. Or you give me whatever authority you want about the admissibility of it without a witness, without a further witness.

MR. RIFKIND: Thank you, your Honor.

THE COURT: All right. We are adjounrned until 10.15 tomorrow morning.

MR. HRUSKA: May I raise a point before we adjourn? We have, of course, on two occasions now given counsel for defendants the designation by page and line of depositions that we want to read on the 3M incident, and

your Honor had mentioned in a conference we had in the robing room some days ago that counsel for defendants should give counter-designations if they plan to read any additional material.

We, of course, would like to have --

THE COURT: Of course, that whole subject has been thrown up in the air by the discussions we've had in the last day or so about the admissibility of depositions.

MR. TOPKIS: Yes.

THE COURT: And I don't know whether you are planning to read any party depositions.

MR. HRUSKA: Exactly; party depositions. That's what we are now limited to.

THE COURT: Then I do instruct defense counsel to advise Mr. Hruska what portion of the party depositions will be read by them.

MR. TOPKIS: As soon as we can, your Honor. We got the designations this morning and I haven't been in my office since then.

MR. HRUSKA: The designations were given last night. In fact, the designations had been given two days before that in the sense of the same pages. We just changed the sequence last night.

I asked Mr. Topkis whether he has had an oppor-

tunity to compile the pages that he intends to read counter to the portions of the depositions that we intend to read, in which case --

MR. TOPKIS: I have not.

THE COURT: Will it really take all that long?

MR. TOPKIS: No. I am expecting to do it tonight.

THE COURT: All right. The first thing in the morning.

MR. TOPKIS: I hope so.

THE COURT: If you need any time --

MR. HRUSKA: Can't we get it tonight if they have it tonight?

MR. TOPKIS: No.

MR. HRUSKA: It is just not fair. It is a two way street.

THE COURT: He doesn't have it at the moment.

MR. HRUSKA: I understand that.

THE COURT: I don't know whether you people stay at your offices all night these days or what.

MR. HRUSKA: We don't go home very early.

THE COURT: Well, do you intend to make a decision?

All right. Mr. Rifkind waves his hand and Mr.

Hruska says they will be there. So, when you make your conclusions, if they are literal about it, phone them and tell them what the story is.

MR. HRUSKA: We get so much insistence on one side, your Honor --

MR. TOPKIS: No, no.

MR. HRUSKA: -- that changes and lines be designated --

THE COURT: I've often said that having been the father of four children has been very useful an experience for the bench. But I really am not interested in the back and forth. I am just trying to see to it that everybody is treated fairly.

I see no reason why, when you have the information, you can't give it to him.

MR. TOPKIS: You are absolutely right, and as soon as we finish, witness by witness, we will make a phone call until what I think is a reasonable hour. I don't care when they quit.

THE COURT: All right. If there is any problem tomorrow, if you need a few minutes to check things out, we will work it out.

MISS KEARSE: It is possible that we may not have ours this evening, but when we have it we will give it

to them.

THE COURT: We can't be quite that casual. If you don't have it by tonight, I think it ought to be tomorrow.

MR. HRUSKA: It is always casual, your Honor, when they are doing it.

MISS KEARSE: Excuse me?

THE COURT: If you don't have it tonight, I think we have to set a time limit of when you will have it.

MISS KEARSE: We will have it tomorrow.

THE COURT: Morning?

MISS KEARSE: Tomorrow morning.

THE COURT: All right. I think every effort ought to be made to get the information by tonight. But if it isn't, I will give you until tomorrow morning.

(An adjournment was taken to Thursday, May 10, 1973 at 10.15 A.M.)

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Date	Page	Line(s)	Error	Change to
May 9	912	24	foryou	for you
	928	19	as	ask
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Date	Page	Line(s)	Error	Change to
May 9	984	6	"Downward	"Ballad
	985	17	takes	tapes
	986	5	plan	planned
	986	22	awholesales	a wholesale
	989	6	have	Have
	993	4	for the	of the
	993	24	refer	referred
	994	4	nymber	number
	997	18	Chapels	Chappell
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	997	22	Chapel	Chappell
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	1007	16-17	not is	not only is
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	1008	9	of	or
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Date	Page	Line(s)	Error	Change to
May 9	1014	9	Alan	Allen
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	1016	2	Alan	Allen
	1020	7	HOnor	Honor
	1021	20	it	sit
	1022	10	Alan	Allen
	1024	21	possible	possible."
	1025	13	fell	feel
	1026	17	Miss Kearse	Mr. Rifkind
	1026	18	-	line should begin Miss Kearse:
	1028	2	Guild but	Guild. THE COURT: Mr. Rifkind ...
	1028	15	know	now
	1037	4	AGA	AGAC

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Date	Page	Line(s)	Error	Change to
Ma	1041	24	make believe	make me believe
	1043	16	Honor, which	Honor to which
	1043	17	reversed	referred
	1050	22	Alan	Allen
	1051	10	couldnot	could not
	1053	23	were to	were sent to
	1054	22	understanding that	understanding was that
	1060	2	thewriter's	the writer's
	1062	14	majormost	major most
	1064	23	Busters	Licenses
	1064	24	referromg	referring
	1065	13	you	Would you
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	1088	8	changes	[illegible]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM	Before: HON. MORRIS E. LASKER, District Judge
vs.	
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.	69 CIVIL 5710

New York, May 10, 1973

STENOGRAPHER'S MINUTES

COLUMBIA BROADCASTING SYSTEM
vs.
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al. 69 Civil 5710

New York, May 10, 1973:
10.15 A.M.

Trial resumed.

MR. RIFKIND: Your Honor, before we proceed, I would like to raise one matter and I would like to ask the witness to step out for just a second. It will only take a matter of a minute.

THE COURT: Mr. Lane, before we take your testimony, there is something we have to discuss in your absence. Could I ask you to wait in the hall briefly?

MR. RIFKIND: Your Honor, pursuant to your suggestion of yesterday, we have arranged to serve a subpoena on Mr. Kellman, largely on the subject of the notes that we were looking at yesterday. It did occur to us that there was one other matter that had come up in the course of pretrial discovery which we would like to get resolved at that time. Namely, they claimed, when we were seeking their ASAC documents before, that a particular document we wanted was privileged. It is a draft of the letter that went out to all the publishers and is fairly important to

us.

We will ask Mr. Kellman to bring it with him so that that issue can be resolved by your Honor. In light of the claim of privilege or conceivably a claim of work product which might be advanced, one thing that would be relevant to the disposition of the claim of work product, if it were made, is whether or not ACAC or its members were in fact contemplating litigation, since work product normally relates to contemplation of litigation.

I would therefore like to ask Mr. --

THE COURT: For that purpose, all right.

Gentlemen, I may have to interrupt the proceedings briefly because the sentence I was supposed to impose at 10 o'clock could not be imposed because the defendant had not arrived and he is in transit. At the appropriate time I will interrupt the proceedings.

Will somebody let Mr. Lane know?

B U R T O N L A N E, resumed.

MR. TOPKIS: Your Honor, before we go any further, it just occurs to me that if Mr. Kellman said that those were his notes, I am prepared to accept telephonic assurance of that and not make a fuss over it.

He did not, do I gather?

MR. HRUSKA: No. That is not the point.

THE COURT: You can talk that over afterwards.

MR. TOPKIS: Okay.

DIRECT EXAMINATION CONTINUED

BY MR. RIFKIND:

Q Mr. Lane, I asked you yesterday, and I am now authorized to reiterate the question to you: at the time you sent out the letter to publishers of November 15, 1965, did you or did the AGAC council contemplate that litigation would be instituted against publishers who entered into BM licensing arrangements?

MR. TOPKIS: By "council" I take it you mean attorneys?

MR. RIFKIND: No. I meant the governing body of the AGAC.

A Well, the letter sets forth our concern about the possible violation of our contract. Throughout the years of the existence of AGAC, I'm not aware of any one occasion where we ever have had to resort to a lawsuit. What we have tried to do is persuade the people we are doing business with as to the right thing to do. And although we may have had the right to rely on a lawsuit, this is something we had never pursued.

Q Well, did you consider at the time --

THE COURT: I guess you really mean did you discuss

it, do you not?

MR. RIFKIND: Yes.

Q Did you discuss it?

A Yes, we discussed it.

MR. RIFKIND: Just one second, your Honor.

(Pause.)

Q Mr. Lane, I call your attention to lines 6 and 7 of page 98 of the deposition you gave in my office and I ask you whether that refreshes your recollection as to whether you ever considered bringing suit (handing).

MISS KEARSE: Your Honor, I don't believe the witness has testified that he has no recollection. I believe he has given us his testimony. This seems to be a --

THE COURT: I suppose you can get around asking him whether he remembers saying --

MR. RIFKIND: All right.

Q Mr. Lane, do you recall that on April 5, 1973, when asked this question you gave the following answer:

"Q What consideration, Mr. Lane, was given by you or by the council or both as to whether or not any of the publishers should be sued for violation of the terms of the AGAC agreement?

"A I don't believe any thought of suing ever entered

our minds."

MR. TOPKIS: "Ever" is not there. Why don't you read the rest of the answer?

Q (Reading) "I don't believe any thought of suing entered our minds. This organization was formed in 1931," et cetera.

MR. TOPKIS: I would like to read not only the full text but with the same emphasis --

MR. RIFKIND: You can do it.

MR. TOPKIS: -- which I will try to do.

THE COURT: All right.

MR. TOPKIS: "I don't believe any thought of suing entered our minds. This organization was formed in 1931, I think, and in all those years I can't remember that we ever sued any publisher. We don't operate that way. I think I said that earlier. We try to persuade publishers of the right thing to do. We try to be fair with publishers, as we hope they will be fair with us. So that at no point, as far as I can recall, was there any thought of suing publishers involved in this action."

THE COURT: Do you recall that?

THE WITNESS: Yes, I do recall the answer.

Q Is that an accurate statement?

A I think it is more accurate than I expressed just

now.

THE COURT: I would like to reconcile this because your earlier answer this morning was that you did discuss possible suit and your former answer on deposition was that you never had any thought of suing.

Do you now mean to say you don't think you did discuss possible suit or you discussed it but you never had any real thought of it?

THE WITNESS: It is hard for me to remember specifically what was said at a particular meeting.

THE COURT: Of course.

THE WITNESS: I think what I mean is that we are using a legal basis to dissuade publishers from doing a certain thing. We know that if this is ignored we have the right to bring suit, but this has not been our method, it has never been our method, to sue.

THE COURT: Am I correct then that it would be inaccurate to say that there was a specific discussion about the possibility of suing?

THE WITNESS: Yes, I think that would be correct.

BY MR. RIFKIND:

Q Now, Mr. Lane, since we recessed yesterday afternoon, have you had discussions with counsel for ASCAP?

A Not really, not on any specific issue.

Q Have you had any discussions at all?

A Yes.

Q Did you have a discussion with them last evening after we left the courtroom?

A On the way home.

Q On the way home. And did you have a discussion with them in the corridor here this morning or any of them?

A Yes, we discussed.

Q Did you talk to Mr. Topkis?

A Yes.

Q Mr. Korman?

A Yes.

Q Anyone else?

A Mr. Blumstein.

Q We were discussing yesterday PX 127 for identification and I was about to ask you whether certain particular phrases jog your memory as to the conversations you had with Mr. Finkelstein and Mr. Arrow in April of 1966.

Did you discuss this particular document with Mr. Topkis or Mr. Korman or Mr. Blumstein?

A No, I did not.

Q Did you discuss your meeting with Mr. Finkelstein with --

MR. TOPKIS: Excuse me. Is this related to our

car rides back and forth?

MR. RIFKIND: I'm asking him.

THE COURT: You mean since yesterday's testimony?

MR. RIFKIND: Yes.

MR. TOPKIS: Mr. Rifkind was invited to come with us. That invitation goes for all our comings and goings throughout this trial. This, your Honor, is just silly.

THE COURT: This occurred on both sides, and I don't think it is terribly impressive on either side, but you are entitled to search.

Q Did you have any discussions with Mr. Topkis or Mr. Korman or Mr. Blumstein or anyone else regarding the meeting that you had with Mr. Finkelstein?

A No, I did not.

Q Looking at page 3 of Mr. Kellman's memorandum, fourth paragraph from the top of the page, it says, "Burke suggested" --

MISS KEARSE: I object to any reading from this document. It has not been admitted in evidence.

THE COURT: I understand that, Miss Kearse. But that much won't be in evidence, and the witness has it in front of him. He can be asked whether it refreshes his recollection, whether it is in evidence ornot, and that is the purpose as I understand it.

MR. RIFKIND: That is exactly my purpose.

Q Do you see the sentence I am referring to?

A Yes.

Q Was there any other Burton at that meeting other than you, Mr. Lane?

A No.

Q Do you now recall making the suggestion referred to there?

I don't remember making the statement, but I don deny that I might have.

Q Skipping the next paragraph, there is another paragraph beginning with the initials H.F.

A Where are you referring to?

Q The paragraph beginning A.A.,which I take it to mean Alan Arrow, and then "H.F.: We cannot accept payment on a per item basis."

Do you see that line?

A Yes.

MISS KEARSE: I repeat my objection. The witness can read the document and, if it refreshes his recollection then that's one thing. But this is another.

THE COURT: I don't know whichposition I find to be more artificial on this point, Mr. Rifkind's or Miss Kearse's. I really don't see why we should be delayed o

something like this. However, since Miss Kearse is technically correct, I will ask you to observe the technicalities.

MR.RIFKIND: I am just trying tocall attention to the line.

THE COURT: I understand. If he has to find it, we'll have to waste time for that.

Q Do you see now the phrase I am referring to?

A Yes, I do.

Q Does that refresh your recollection as to anything that Mr. Finkelstein said?

A No, it does not.

Q Dropping down past the next A.A. and the next H. F. to one more H. F., a sentence beginning only with the word "There," as in "There is," do you see that paragraph?

A I do.

Q Does that paragraph refresh your recollection as to anything that Mr. Finkelstein said?

A No, I don't remember.

Q You don't remember anything he said?

A I don't remember specifically Mr. Finkelstein making that remark.

Q In words or in substance?

A I would not be sure of my accuracy if I said yes or no. I really don't remember.

Q Dropping down to the next A. A., the sentence in the paragraph beginning with the word "We," particularly the last sentence in that paragraph which also begins "We would," does that refresh your recollection as to anything Mr. Arrow said?

A Not at all.

Q Do you recall anything that Mr. Arrow said at all at that meeting?

A I don't remember anything specifically that anyone said. I only remember an attitude which I was satisfied with at the end of the meeting. But I don't remember anything that happened during the meeting.

Q The attitude was the one you referred to yesterday, the arrogant attitude?

A No, no. I'm referring to my satisfaction at the end of the meeting when Mr. Finkelstein and Mr. Arrow agreed to arrange meetings and begin negotiations.

Q Now I ask you, Mr. Lane, because I thought you testified yesterday at the end of the meeting you went to see Stanley Adams because you were disturbed about something that happened at the meeting.

A I was disturbed at what happened. I believe that took place in the early part of the meeting, not at the end.

Q Well, if your mind was at rest and you were no longer disturbed at the end of the meeting, why did you then go to see the president of ASCAP?

A Well, I had a right to be disturbed, I think, at the attitude that was taken by Mr. Finkelstein in the early part of the meeting. I did not expect or intend to atten

all future meetings. I was concerned that this attitude of arrogance, an attitude of being flip, was going to continue at other meetings, and I wanted to express it to the president of ASCAP.

Q How, to the best of your recollection, did Mr. Finkelstein express the attitude of arrogance you referred to?

A I couldn't tell you that now.

Q Do you recall the subject matter about which he was arrogant?

A No.

Q Looking at page 4 of the Kellman memorandum, the first paragraph at the top of the page beginning with A. A., does that refresh your recollection as to anything Mr. Arrow said at the meeting?

A No, it does not.

Q Looking at the next paragraph, marked H. F. --

THE COURT: May I really ask that Mr. Lane be asked to read the entire memorandum and see whether anything in it refreshes his recollection about anything that took place?

MR. RIFKIND: All right.

Q Would you read the balance of page 4?

(Pause)

THE WITNESS: Your Honor, other than the general subject that was being discussed, I cannot remember specifically what was said.

THE COURT: And reading that doesn't refresh your recollection?

THE WITNESS: It does not refresh my memory except, as I say, I remember this is what -- they weren't talking about baseball games.

THE COURT: They don't stimulate your own independent recollection.

THE WITNESS: No.

Q And that includes the statements attributed here to you? That is, even as to the statements attributed to Burton?

A That is correct.

Q You don't recall any of those statements?

A No, I do not. Again, I don't deny it. I just don't remember.

Q Do you recall any discussion with respect to the problem, or supposed problem, of an ASCAP license with respect to the 3M tape or tapes that had already been sold and already been directly licensed bypublishers?

A Do I remember a discussion of that?

Q Do you remember that as a subject that came up at

the meeting?

A I remember -- I think I remember that being discussed.

Q Do you remember the position taken by anybody with respect to that subject?

A No, I do not.

Q And this memorandum does not refresh your recollection on that?

A No.

Q Now, after this meeting in April of 1966, what further role did you play, if any, in the discussions between 3M and ASCAP, if any?

A Well, I continued to show an interest. I believe I made a number of phone calls to Mr. Finkelstein and asked him how things were going. I may have written one or two letters in the course of the ensuing months telling him that we were still interested in what was going on.

I do remember attending one or two writers advisory committee meetings with ASCAP in which Herman Finkelstein would sort of look at me with a smile and say, "I know Burton is interested in what is going on with the 3M negotiations." That's what I remember about my future -- that is, my activity after this meeting.

THE COURT: Did your west coast people quiet

down after you got 3M in direct contact with ASCAP?

A I don't think so. It is a strange thing about the west coast committee during these days, and not only is it true on this particular subject. But whenever they would get aroused about something, and we would be very careful to try to explain the situation because I know what it is, having lived there for many years myself, being away from the center of action, things become exaggerated, the hysteria rises very quickly, we were very careful to explain whatever issue was at stake, and four or five months later we would get letters as if the answer had never been received. You know, we would have to go repeat and repeat and try to soothe them or explain to them whatever the issues were.

So that I don't think that our statement that we had brought the parties together made very much impression.

Q Mr. Lane, was that hysteria, excessive concern or whatever, expresed by the west coast to the council -- did that come only from the west coast or were there east coast members also who communicated to you similar points of view?

A My recollection is that it mainly came from the west coast.

Q Was it mainly or exclusively?

A I would say exclusively. I don't remember. I may be wrong, but I don't remember any upset being expressed to us from the east coast.

Q Mr. Lane, let me show you Plaintiff Exhibit 125 for identification and call your attention to the first sentence of the page numbered 1.

A I must have a very poor copy here.

Q The sentence appearing right under the date January 1966.

THE COURT: Miss Kearse?

MISS KEARSE: This document has not been offered in evidence yet.

THE COURT: I guess he is going to identify it so it can be offered.

MISS KEARSE: I thought I saw it handed up to the Court.

THE COURT: It was handed up so that in case it is necessary for me to do anything, I will. I am not reading it.

MR. RIFKIND: The only question I wish to ask about this document is whether that first sentence of this memorandum refreshes the witness' recollection as to whether or not there were not east coast members who were also in

the frame of mind, or expressed a frame of mind, similar to that of the west coast members.

MR. TOPKIS: I was asleep before, your Honor. I should have objected to this line of questioning on the ground that it calls for a hearsay of unnamed people.

THE COURT: Certainly Mr. Lane had personal contact with the west coast. Maybe he had some personal knowledge about the east coast. If he didn't, he can tell us.

But the question at the moment is whether the passage referred to by Mr. Rifkind refreshes your recollection, Mr. Lane, as to whether the Guild or you received any expressions of concern or complaints from the east coast about this subject.

A Do you want me to read this first line?

Q I am really calling your attention to the phrase that appears in parentheses on the third line of page 1 of this memorandum.

A I don't remember, and I don't even know what this paper is I'm reading, frankly.

THE COURT: It doesn't refresh your recollection?

THE WITNESS: No.

Q Mr. Lane, would you look at the preceding page,

and I ask you whether that indicates to you what this document is. Who is Abel Baer?

A Abel Baer was the president of the Guild who preceded me.

Q Was he in 1966 the chairman of the council?

A In name. Actually I chaired the council. But in name that was his title.

Q Do you recall whether or not there was a meeting of the council in Januayr of 1966 which discussed the 3M situation?

A Without having the minutes before me, I wouldn't know. I know we had meetings, but whether it was on that particular day or not, I don't know.

Q It's your testimony that you have no recollection of suggestions similar to those made by the west coast members being made to the council and considered by the council from east coast members.

A I don't remember. The reason I do remember about the west coast is because there was such a big and major point made by them. If there was similar recommendations or expressions made by east coast members or council members, it probably was not to the extent that it would cause me to remember now.

Q During the discussions, communications that you

had with Mr. Finkelstein in the period following the meeting of April 1966, did you ever inquire of Mr. Finkelstein what the obstacles to agreement with 3M were?

A No, I did not. I don't believe I did.

Q At any time from the time you first heard of the 3M situation until an agreement was finally reached between 3M and ASCAP, did you inquire as to what the difficulty in reaching agreement was?

A No. And my reason for saying no is I didn't feel it was my business. I assume that when people are negotiating, and I was assured that they were negotiating in good faith, that there would be obstacles to be overcome.

Q When you heard from Mr. Finkelstein from time to time in 1966 or 1967 or 1968 that discussions were progressing, did you ever ask Mr. Finkelstein what are the terms on which you think you are going to reach agreement with 3M?

A No. Again, I never thought that would be our business, that whatever terms were arrived at would be subject to a vote by the board of directors upon which writers and publishers both sat with equal force, and that my interests would be protected by their decision.

27A

Q Did you ever hear that 3M and ASCAP did reach an agreement?

A Yes, I did.

Q Do you recall when that was?

A Not exactly.

Q Some time in 1968?

A Could be.

Q Did you express to Mr. Finkelstein pleasure, your pleasure, in hearing that news?

A I must have.

Q You experienced pleasure?

A Yes.

Q Did you know at that time what the terms were on which ASCAP and 3M reached agreement?

A No, I did not.

Q Do you know at this time?

A No, I do not, but I don't know the terms that ASCAP arrives at with any of its customers.

Q Do you know whether the terms reached by ASCAP with 3M were more or less or equally advantageous for the writers, financially advantageous for the writers, whose works were to be used by 3M than the direct dealings that some publishers entered into?

MR. TOPKIS: If your Honor please, the witness

has already answered that question by his answer to the prior question.

THE COURT: I should think so. If he doesn't know what the terms were, I don't know how he could tell whether they were advantageous.

Q Did you ever know what the terms were on which 3M and the publishers had agreed on licenses?

A The publishers never contacted us at all. At least my publishers never contacted me.

Q So far as you are aware, then, the terms which ASCAP reached with 3M may be substantially worse, as far as the writers involved are concerned, than the terms reached by individual publishers?

THE COURT: I think that is a point for argument, Mr. Rifkind. It is certainly a deduction that could be drawn.

MR. RIFKIND: I am concerned about the source of such pleasures of Mr. Lane.

THE COURT: Ask him.

Q Why were you so pleased to learn that ASCAP --

THE COURT: He didn't say he was so pleased.

Q Why were you pleased to hear that ASCAP and 3M had entered into a deal when you had no view as to what the terms or benefits of that deal were?

A I am pleased when writers are consulted as equal partners with publishers and sit down and arrive at terms with potential users of our works.

I am not pleased when writers are not consulted. I don't know what is happening then and no writer does.

THE COURT: Mr. Lane, would you have a significant personal stake in the outcome of these negotiations? In other words, would your income be particularly affected one way or the other by the negotiations between 3M and ASCAP?

THE WITNESS: I would imagine that I would be affected if works of mine were used. Naturally, I have no way of knowing if they were or were not included in any deal with 3M, but I think my position would be no different from any other writer.

We do receive our performing rights moneys from ASCAP. ASCAP engages in many deals.

I don't know if any members who are not on the board of ASCAP know what the terms are with ASCAP's customers.

We do know that, most of us, I think, feel that we are treated fairly, that writers sit with publishers and will okay a deal that has been made, or not okay it.

When publishers make a deal, we really are not informed at all. We don't know what's happening.

Q How do you know whether you were treated fairly if you don't know what the terms of the ASCAP deal were?

MR. TOPKIS: Hasn't that been answered, again and again?

THE COURT: I think Mr. Lane hasn't said that he knows he was being treated fairly. He said that he has been satisfied, personally, and his associates have, that they were treated fairly, although apparently they have made no inquiry, which I take it to mean the results of what has happened have been satisfactory to them.

Is that correct?

THE WITNESS: I think that is correct. Again, I am stressing my confidence in people whoare doing exactly the same work as I do, who sit on the board of ASCAP. If they are hurt, I am hurt, or, if I am hurt, they are hurt.

I don't think they would okay something which would hurt themselves.

THE COURT: I understand.

Q Well, Mr. Lane, not all writers were equally affecte were they, by the decision of 3'1 to obtain its license from ASCAP rather than from publishers directly? The only writers affected are the writers whose works were to be used; isn't that correct?

MR. TOPKIS: I suggest, your Honor, that is argument.

THE COURT: Sustained.

Q Does the fact that 3M obtains a license from ASCAP, rather than from specific publishers, have any significance that you can see for the financial position of writers other than the writers whose works are used by 3M?

MR. TOPKIS: Same objection, your Honor.

THE COURT: Well, I don't think the same objection is appropriate, but I don't know whether Mr. Lane can answer it.

Will you read back the question, please.

(Record read.)

A I find it difficult to understand the question. I am not clear, really.

Q Well, you said that there were the writers on the ASCAP board and their interests are the same as "mine," you said.

But is that really true in a specific situation? That is that I don't understand.

THE COURT: I think what Mr. Lane is saying, and correct me if I am wrong because I don't want to put words in your mouth but I would like to shorten the proceeding, if we can get your answer without taking so long, is that

you did not know how this was going to work out for specific writers.

THE WITNESS: That's right. I did not.

THE COURT: But it was your belief that all writers were affected in the same basic way; that is, to the extent that their music was played, they would be affected.

THE WITNESS: That's right.

THE COURT: That you understood that some might be played more than others.

THE WITNESS: Yes.

THE COURT: That your sole objective was to see to it that the decision with regard to the terms of this should be made by an organization in which the writers had equal representation.

THE WITNESS: That is absolutely correct.

Q Mr. Lane, have you ever expressed doubt, your doubt, as to whether writers were in fact adequately and properly represented in the management of ASCAP?

MR. TOPKIS: Objection, your Honor. Are we going to try that issue? I think we have enough to try here.

THE COURT: No, we are not going to try that issue but I might hear some testimony about it. I don't suppose it would be very lengthy, anyway.

I will allow the question.

A You are asking if I have expressed doubt as to whether the writers had an equal voice in the operation of ASCAP?

A I said an adequate voice. If the interests of writers were in fact represented adequately.

I don't believe that I have raised a question about that particular point, no.

Q You do not?

A I don't think so.

Q Did you ever express the view that ASCAP appeared to you to be managed by its counsel, rather than by its management; that is, by its attorneys, rather than by its management?

MR. TOPKIS: I object to that question, too.

THE COURT: I don't think that would shed much light on the question of writer representation, so I will sustain the objection.

Q Mr. Lane, I would like to show you PX 148.

Can you tell me what this document is, Mr. Lane?

A It is called a resolution proposed by Burton Lane for Stanley Adams Advisory Committee of ASCAP.

Q That is what it's called. Now, what is it?

A There was an examination by a couple of writers concerned with the internal operation of ASCAP in the light

of various changes in the consent decree.

Q Who were those couple of writers?

A I was one of them and Eddie Eliscu was the other.

Q Was that investigation at the behest of the AGAC?

A No. It was not at the -- I don't believe it was at the behest of AGAC.

We were, as members of ASCAP, we were -- we felt that we had a right to see that ASCAP was being operated properly and we were concerned that no violations or -- were being made that would cause our position as writers to be insecure.

Q Did the AGAC council ever adopt a resolution appointing a committee consisting of you and Mr. Eliscu to investigate the situation of writers in ASCAP and what might be done to improve it?

A We may have had a resolution or a recommendation of that kind.

Q Is it your recollection that you did?

A I am not certain. I probably -- we probably did.

THE COURT: What kind of an examination was it? Did you get somebody to examine the books, or what?

THE WITNESS: We were concerned, your Honor, and I don't remember what caused us to become concerned specifically. One question was, was ASCAP being operated, really,

by the legal department or by the members; that is, were the board members just sitting there as rubber stamps for counsel --

THE COURT: How did you go about finding the answer to that question?

THE WITNESS: We did discussions with the legal department.

THE COURT: You asked people what they did, is that it?

THE WITNESS: Right.

THE COURT: When did all this occur?

THE WITNESS: I don't remember.

Q I think we agreed, Mr. Lane, just to save time, in your deposition that this was some time in or after 1960, and I think if you look at page 5 of Exhibit 148, that will confirm that impression.

THE COURT: Do you know, how specifically does it indicate what the year was?

MR. RIFKIND: It just refers to it.

THE COURT: In or after 1960?

MR. RIFKIND: Yes. In or after, I think.

Q Isn't that right, Mr. Lane?

A I think so, yes.

THE COURT: Are you going to put this in evidence?

MR. RIFKIND: I will.

THE COURT: Why don't we get it in evidence so I can look at it?

MR. RIFKIND: I thought one more step might help in that direction, to buttress any objection any objection that I expect to hear.

THE COURT: All right.

Q Let me show you PX 147 for identification.

A I did not prepare this.

THE COURT: Which one? 148?

THE WITNESS: 148.

Q Does PX 147 for identification refresh your recollection as towhether or not the AGAC council in fact adopted a resolution providing for the appointment of a committee to make a study of the situation of the writers in ASCAP?

A It states that here.

Q What is PX 147, Mr. Lane?

A Well, the heading is Burton Lane To The Council.

Q Are these remarks that you made to the AGAC council?

A I would like to look at this.

Q Please do.

(Pause.)

A Yes, I remember these remarks.

Q Are these remarks that you made to the council

either orally or in writing?

MR. TOPKIS: Your Honor, before we go any further and waste any more time, could I invite your Honor to take a look at this piece of paper? It couldn't be less relevant to what we are talking about here. I don't care about the technique employed.

THE COURT: I thought 147 was before Mr. Lane for the sole purpose of refreshing his recollection as to whether a member of the committee of the Guild instituted the action referred to in 148.

MR. RIFKIND: Exactly. I believe 148 is a result of an effort made by the Guild.

THE COURT: Now that you have looked at 147, do you also agree that the examination you have made was made as a result of a Guild resolution?

THE WITNESS: Yes, I do.

THE COURT: Then we don't need 147.

MR. TOPKIS: Could we go to 148, then, and I'll offer the same invitation to your Honor?

THE COURT: That I will decide when it is offered.

Q You said a moment ago, Mr. Lane, that you did not draft the language.

Is it your recollection that it was drafted by counsel, by the attorney for the Guild, Mr. Schulman?

THE COURT: Now you are speaking about 148?

MR. RIFKIND: 148, yes.

A I believe so.

Q Did Mr. Schulman have any other connection with these matters, other than as counsel for the Guild, so as you are aware?

A No, he did not.

Q Do you recall what was done with this memorandum?

A I don't know whether I said this at my deposition or not --

THE COURT: It does seem to me we are getting on awfully slowly. Can't we just put it in evidence and let me see if it's relevant?

MR. RIFKIND: I offer it in evidence.

MR. TOPKIS: Would your Honor look at it and see what we have been wasting time on? I submit it's immaterial.

THE COURT: Let's not characterize it that way. This is 148, right?

MR. TOPKIS: Right.

MISS KEARSE: I share Mr. Topkis's position that it is irrelevant, your Honor.

THE COURT: I would suppose so.

I don't see anything here about any reports. At least, I haven't gotten to that yet.

MR. RIFKIND: I can call your Honor's attention to some things.

THE COURT: Do you want all the pages of this in evidence?

MR. RIFKIND: Some paragraphs I think are more significant than others and I'll be happy to call your attention to them.

THE COURT: I wish you would.

MR. RIFKIND: At the top of page 2, the first quote "Whereas."

THE COURT: I don't understand what this really has to do with this.

I am being asked to decide whether ASCAP has violated the antitrust laws, notwhether AGAC thinks kindly about ASCAP.

I am thoroughly interested in the 3M incident, to see whether it does indicate a difficulty in by-passing, but it really seems to me terribly remote, here.

I understand that there are times when the Guild has had it in for the publishers and there are times when the Guild has had it in for ASCAP and it has always been looking out for its own interests; if they happen to conflict with one, they conflicted with one, and if they happened to conflict with the other, that was that.

If this is the kind of material that you think is relevant, Mr. Rifkind, I am afraid I just disagree.

MR. RIFKIND: Well, it is relevant in this sense: The witness has urged that at ASCAP, the writers have a voice.

THE COURT: Yes.

MR. RIFKIND: And this memorandum, I think, casts serious doubt on the voice of the writers at ASCAP.

THE COURT: I think it indicates that as members of an organization -- it has already been testified to anyw by Mr. Lane -- that they were unhappy about ASCAP from time to time, that they thought their interests weren't adequate represented there or, at least, if they weren't adequately represented, that you wanted to be sure about it.

THE WITNESS: In an organization of, I think, 15,000 writers, there are, from time to time, complaints. We as writers were interested that these complaints be resolved in a fair way. This was our only interest.

THE COURT: And, as I understand it, the Guild di pass a resolution, as you now recall, asking you and Mr. Eliscu or somebody to look into the situation.

THE WITNESS: That's correct.

THE COURT: As to who was running the show there, is that right?

THE WITNESS: That's correct, and if we had any recommendations to help make ASCAP better. This is what we were there for.

THE COURT: I am willing to hear that story, but I think this doesn't cast any light, and I sustain the objection.

MR. RIFKIND: I want to add that the witness has testified that after the submission of these materials, the consideration of them by the ASCAP Advisory Committee, he is not aware of any action that was taken by ASCAP to remedy the deficiencies identified in this memorandum.

MR. TOPKIS: I object to that, of course, your Honor.

THECOURT: When was that testified to?

MR. RIFKIND: At the deposition in this proceeding

THE COURT: That is not before me.

MR. RIFKIND: That is what I am seeking to explore

THE COURT: Explore it, then, but I am not even sure just how important that would be, but that doesn't make this document admissible.

Excuse me, gentlemen. This is a good time for me to proceed with the other matter.

Let's take a 15-minute break this morning.

(Recess.)

T3

Q Mr. Lane, at any time prior to 1968 was the position of the AGAC, while you were president, that the continuing crises in ASCAP had created dissatisfaction so widespread, and a sense of insecurity so critical, that the problem must be looked into immediately?

MR. TOPKIS: I object. I don't think we can really try the problems, internally or externally, of ASCAP.

THE COURT: Give me a little more of what CBS's theory is of the significance of this dissatisfaction.

MR. RIFKIND: Mr. Lane has testified that irrespective of the terms reached by ASCAP, it was the position of the Guild that 3M should obtain an ASCAP license rather than a non-ASCAP license because of the representation of writers in ASCAP. Prior to that time the Guild hadtaken a position --

THE COURT: You are offering proof --

MR. RIFKIND: I would like to prove that, in fact, ASCAP was creating widespread dissatisfaction among writers.

THE COURT: Are you therefore attempting to question the validity of the previous testimony?

I will hear it.

MISS KEARSE: This is something to impeach his

own witness. It sounds like cross-examination when, in fact, this is direct examination.

MR. RIFKIND: I think, your Honor, it is perfectly clear at this point in the examination that Mr. Lane has a community of interest with ASCAP; that he is disposed to the ASCAP position both professionally and financially; and that I am entitled to treat him, in substance, as an adverse witness.

THE COURT: To be accurate, in my mind I don't find those things in that black or white position. There may be motivations one way or the other.

I will allow you to put the questions that you have. I am trying to get to the truth of the facts, and I believe that's a proper way to do that.

MR. TOPKIS: Could I press this objection, your Honor?

My problem with this line of testimony is that if Mr. Rifkind goes into it I either have to call witnesses to demonstrate the contrary of whatever he elicits or rely on my judgment that it is totally irrelevant. I confess the latter would be the more likely course.

THE COURT: I will ease your problem to this extent: after I have heard the testimony, before you are forced to that choice or have to line up a lot of

witnesses I will tell you whether I think it is necessary.

MR. TOPKIS: Fine.

Q Do you have the question?

A I don't remember it.

THE COURT: I will ask the reporter to read the question.

(Record read.)

A The language of that question seems a little over-stated.

Q I was reading from Plaintiff's Exhibit 147.

THE COURT: Let the witness answer.

MISS KEARSE: Plaintiff's Exhibit 147 is not in evidence.

THE COURT: Furthermore, it is not necessarily Mr. Lane's language.

A We were alarmed that there were groups of dissident members in ASCAP who were complaining about certain aspects of the operation of ASCAP and were unwilling, for reasons which we thought needed exploring, to try to solve their problems within the organization.

THE COURT: Which organization?

THE WITNESS: Within ASCAP.

A (Continuing) It was because of this that we took on this exploration or examination of ASCAP to see whether

people were not being treated fairly or whether they were.

I think a good deal -- we were relieved, after examination, to know that ASCAP was doing its best to treat people in a fair way, and many times, again, with a membership of 15,000, everybody does not act in a reasonabl way: many of the complaints against ASCAP we found to be unreasonable. We were satisfied about that.

Q Does the document that has been identified as Plaintiff's Exhibit 148 reflect a report based on your examination?

A I am not certain whether this reprents my views after the examination or during it. I don't know that.

Q Let me call your attention to pages 189 and 191 of the deposition that you gave where you said, "I don't think" --

MISS KEARSE: I object to the reading of this. If this is to refresh the witness's recollection, let it be shown to the witness.

MR. RIFKIND: I will show it to him.

Q Look at lines 17 and 18 of page 189.

A (Pause) Yes?

Q Look at lines 3 and 4 of page 191 of the deposition transcript.

A (Pause) Yes?

Q Do you now recall whether this report that was marked as Plaintiff's Exhibit 148 was based on the investigation that you and Mr. Eliscu conducted pursuant to AGAC's resolution?

A I don't think -- I don't remember ever having seen this before the day of the deposition, this document which we are talking about.

Obviously this is not my language.

THE COURT: It is not your language?

THE WITNESS: It is not.

A (Continuing) If we made some recommendations -- I cannot believe -- I don't remember ever making a report that could fill this many pages (indicating). This, obviously, was made by legal counsel.

THE COURT: I guess Mr. Rifkind is not asking you whether you actually prepared the report but whether it was based on your investigation and reflected the results of your investigation.

THE WITNESS: I have not read the entire report and I don't know what the contents are except for reading the first page or glancing at it.

BY MR. RIFKIND:

Q You were clear in your mind, as far as I can make out, on April 6 that this report was based on your investi-

tion?

MISS KEARSE: Objection, your Honor.

THE COURT: Overruled.

We should not play games about this.

I would like to know whether he thinks this is his report or not. If there is an indication that on prior occasions he did --

MISS KEARSE: I suggest, your Honor, there is indication of some doubt in the deposition transcript itself.

MR. RIFKIND: Would you like to examine the deposition, your Honor?

THE COURT: I will allow the parties to read me whatever they wish from that passage of the deposition so I have a background.

Q (Reading) "Q Can you tell us what it is and the circumstances which led to its creation?

"A Well, I think this is a report based on the findings of this committee which went in to study ASCAP."

Then, on page 191:

"Q Do you know who did write it?

"A I would imagine legal counsel wrote it based on the feelings which Mr. Eliscu and I submitted."

THE COURT: Do you feel differently about the

situation now, Mr. Lane?

THE WITNESS: I do have doubts, your Honor. I am very trusting. When I see something shown to me which says that a resolution wasproposed by Burton Lane, I am inclined to accept this as something, even though I don't quite remember -- I am inclined to accept this as something I dealt with in the past. I'm not sure that I have ever seen this document before.

THE COURT: Is there anything you want to read, Miss Kearse?

MISS KEARSE: Well, there is a question as to who the legal counsel might be, whether that would be Mr. Kellman or whether it might have been John Schultz. But, at any rate --

THE COURT: I suggest this: Why don't you go on to other questions and then we can give Mr. Lane a few moments to look this over and see whether he disbelieves it was written on the basis of his investigation. I would like an answer one way or the other after he has looked at it.

THE WITNESS: Thank you.

MR. HRUSKA: May we request on that, your Honor, that when the witness does read it he does so outside of the presence of counsel?

THE COURT: Yes.

BY MR. RIFKIND:

Q Were any of your compositions included, to your knowledge, on the 3M tape or tapes?

A You mean the deal that was made directly with publishers?

Q Yes.

A I believe there was one song that was included in that list.

Q Was your consent obtained?

A No, it was not.

Q Who was the publisher?

A Bourne Music.

Q Had they requested your consent would you have granted it?

MR. TOPKIS: I object, your Honor.

THE COURT: Sustained.

MR. RIFKIND: The reason for the question was to find out Mr. Lane's state of mind. He said he wanted to be consulted and I want to know whether had he been consulted he would have consented.

THE COURT: I don't really think it would mean much to me if he said yes.

MR. HRUSKA: The point is it might mean something

if he said no. That's the point of the question.

We have, your Honor, an issue on state of mind. We have to start somewhere. Mr. Lane, as the former president of an organization consisting of more than 3000 songwriters in the United States, members of ASCAP and BMI who had a position on this, is a pretty good place to start, I submit.

THE COURT: All right.

THE WITNESS: I would be certainly be willing to consider any deal that concerned my songs absolutely.

Q In your consideration of the communications that you received from the West Coast concerning the BM situation, was there any discussion at the AGAC council of why it was that some writers believed, or appeared to believe, or represented that they believed, that they should band together mutually to agree not to grant consent?

MR. TOPKIS: Is the question at an end?

MR. RIFKIND: Yes.

MR. TOPKIS: May I have it read back?

(Record read.)

MISS KEARSE: Objection, your Honor.

THE COURT: I am sustaining it basically, aside from the question of form it seems to me it asks whether there was a discussion about the state of mind of other

people. I can't see that that can help. I would not even know whose state of mind it was or what discussion or discussions he is talking about.

MR. RIFKIND: The witness has testified that it was the council's view that their West Coast Committee was proposing illegal activity, asserted illegal activity. The witness testified that that was voted down because it was illegal.

What I am trying to find out, your Honor, is whether it was not also voted down because it should have been wholly unnecessary.

THE COURT: If that's true, just ask the witness whether it was not also voted down for other reasons.

I have not brought the proposition that Mr. Lane is a hostile witness in the ordinary sense of the word. There are certain aspects of his past testimony, deposition, that may reconcile with his present testimony.

I don't think that it is at all appropriate for a full-scale cross-examination of Mr. Lane on your part.

BY MR. RIFKIND:

Q Mr. Lane, did you ever express the view that the action, the considered action, proposed by the West Coast was not only illegal but made no sense because it was unnecessary?

A I don't know whether that thought was expressed or not. The way these things are discussed at a council meeting, the correspondence from the West Coast would be read. I would read it. It would be up for discussion, for a free discussion. If it dealt with a legality, something which had to dowith the law, the floor would be turned over to our legal counsel who would explain the implications of what was being requested by the West Coast.

I don't know that it would ever be necessary, and I don't know that it was discussed or not discussed -- I don't remember -- but I don't know that it would have been necessary to discuss it once the legal implications were explained to us. There would be no point in going any further once we knew to take such-and-such action would be illegal. This was not our function.

Q Did you ever express the view that but for the legal inhibitions and restrictions you would have gone further and done more?

A I don't think so. I must say that songwriters are very flattered more than they should be when someone wants to use their works orplay their works. We don't get riled up if someone says, "He would like to use what you have written." We are delighted. It is just that we want to be treated fairly.

Q Did you or council at any time during this 3M situation other than in the letter that you sent out on November 15, 1965, say to any publisher, representative of a publisher in words or substance, "We just want to make sure that the writers are being treated fairly. Tell us in detail what deal you have made with 3M so we can determine whether it is a fair deal."

A I personally do not remember contacting publishers to tell us what they were doing. The letter that was sent out was to all publishers with whom we dealt. I don't believe -- I can't remember, but I don't believe that in any part of that letter we said that if they dealt with 3M they would be doing something they were not supposed to be doing or that would break our contract. We just asked that they observe our contract in dealing with 3M.

THE COURT: You did indicate that you felt block licensing might be a violation?

THE WITNESS: That's what I meant, in dealing with 3M, that our contract and our rights be observed, but we never indicated to them that they had no right to deal with 3M.

THE COURT I assume your apparently competent attorney told you, of course, they had a right to deal with 3M?

THE WITNESS: Absolutely. Yes.

We also were aware, your Honor, that ASCAP did not have an exclusive license.

THE COURT: Yes.

Q Mr. Lane, you referred yesterday to the AGAC royalty checks and publisher auditing procedure which was instituted during your period as president.

A Yes. It was so instituted during my period as president.

Q To your knowledge, in the course of auditing publishers who dealt with licensing directly, 3M, did you detect any unfairness, or did the auditors detect any unfairness, that was reported to you in the deals that were made between 3M and individual publishers?

MR. TOPKIS: I suppose that question meant "inaccuracies" and not "fairness." Auditors don't --

THE COURT: Did they raise any criticism of the transaction?

Q Did they raise any criticism of the transaction with respect to the passing through of royalties of writers, which was the purpose of the audit, I take it?

A Which had to do with 3M?

Q Yes.

A No. They did not.

First of all, at the beginning of our auditplan, Price Waterhouse was used, which was an outside company not affiliated with our Guild.

One of the things we felt was really important to impress our membership with was when they put this plan in that the officers of the Guild would not be a part of obtaining information dealing with any members private monetary affairs, so I have remained completely, and all of the other officers of the Guild have remained completely, out of what would come out of an audit except if we discovered that a publisher owed a writer a sum of money, that would be called to our attention and legal counsel would then take action on it; but as far as any details of auditing, or personal information, we were very careful not to become involved in something which we felt was none of our business.

Q Did you get any report from Price Waterhouse, or any other auditor, that money was being withheld that was attributable to the 3M transactions?

MR. TOPKIS: Your Honor, suppose some publisher cheated? Suppose he did? What difference does it make? Suppose he was caught and suppose he was not caught? What difference does it make?

THE COURT: I suppose Mr. Rifkind is trying to

bring out the fact that in spite of the anticipated problems dealing directly with the publishers there were not any. I don't think that's relevant because I don't think it has ever been stated by Mr. Lane or anybody else that that was the basis upon which their objections were made.

MR. RIFKIND: I do call your attention to the fact, your Honor, that this period between Mr. Lane's letter to the publishers, the warning letter, and the deal finally made by ASCAP, was three years and people continued to be exorcised about the judgment throughout that three-year period. If all experience was that everything was open and aboveboard and clean and simple and profitable, indeed why the continued excitement?

MR. TOPKIS: I know of no continued excitement. The licenses were operating and the point is so thoroughly clear: the complaint is the same one that was uttered at the Boston Tea Party: No taxation without representation.

THE COURT: Of course Mr. Rifkind is challenging that.

I will allow brief questioning on this. Let's try to move along. Mr. Lane has been on the stand for a long time and we have a lot of witnesses to go.

BY MR. RIFKIND:

Q Did you hear of proceeds of 3M licenses that were

not properly passed on by publishers?

A No, but I didn't hear of any sources of income that were not passed on specifically, unless we found the auditors found money and, as I say, in the six- or seven-year period we are talking about --

THE COURT: I will ask a few questions to try to dispose of this.

So far as you know, to the extent that there was a direct relationship between 3M and the publishers, did writers receive in due course the payments they were entitled to?

THE WITNESS: From firsthand information I could not answer that. I don't know.

THE COURT: You never were apprised or received complaints on that score?

THE WITNESS: No, I did not.

THE COURT: Were there ever any discussions among you and the other people and the Guild that there was no need for a direct deal between ASCAP and 3M because experience showed that the 3M publisher deal was working out well after all?

THE WITNESS: I don't remember such a discussion.

THE COURT: Thank you.

BY MR. RIFKIND:

Q Do you remember the reverse, that there was a need for an ASCAP license because 3M and publishers who dealt directly were dealing in some unfair and improper way?

A I don't I ever said that our only concern was that when they dealt with publishers writers had no voice in what was going to happen to their works.

Q Mr. Lane, you have given another cause of concern about direct publisher-3M transactions, and you have referred to that as a problem of policing. Could you explain what that problem was supposed to have been.

A The problem was simply if publishers entered into a deal with 3M and tapes were made, publishers were not equipped to know what would happen to these tapes once their deal was completed, once the term ranout.

Q And therefore --

A And, therefore, we were concerned about what would happen to 700 of our songs on each tape after their term expired.

Q After the expiration of the term of the performance license granted directly by the publisher to 3M and by 3M to its customers, do those tapes raise any more of a policing problem than any of the millions of phonograph records that are floating around the country?

A That sounds like a question too complicated for me to answer. I think their recordings of songs --

What would that have to do with licensing of performing rights?

Q Precisely.

Let me put the example this way:

I go out and buy a phonograph record at Sam Goody's in Manhattan. I don't get a performance rights license. I take it to my barbershop and play it for the entertainment of my customers. That is a public performance for profit, I take it, and unauthorized.

Why at the end of the expiration of the performance rights license granted by a publisher to 3M is that any different than that phonograph record?

A I really don't know the implication of your question.

If the tapes used by 3M had been licensed for performing rights as opposed to records -- I don't even know what you are referring to in terms of records that are available to be played. If someone uses a record and has not obtained a proper license, that's an infringement.

Q What is supposed to happen if I take a regular ordinary recording, commercially available for three or four dollars, and I use it for a commercial performance

for profit without a license?

A Well, you could be used for infringement.

Q Does ASCAP have some mechanism for policing that and seeing to it that I do not do it?

A ASCAP does.

Q Do they send around field men to investigate?

A I think they have various methods. This is a very complicated program we have. I really am not familiar with the details of how that is done. I know it is done.

Q You are sufficiently familiar with it to know that ASCAP had a system andthepublishers didn't?

A That's correct.

Q Three years after the expiration of the 3M performance rights license, ASCAP field men -- let us suppose -- find me playing a 3M tape without a license in my barbershop. Is that any different than finding me playing a Columbia record in my barbershop?

MR. TOPKIS: Your Honor, I suggest that that is in some measure, at least, a legal question.

THE COURT: I sustain that.

If you want to ask what the fears were arising at the termination of the license, I think you can ask him that and see what the answer is.

What was it you were worried about would happen

at the end of the term?

THE WITNESS: We were worried that our works would be used without our receiving a performance fee; that there would be no way for publishers, who are very limited just as individual writers are limited, in policing a nation as large as ours for illegal use of our works --

THE COURT: I am afraid whatever discussion we have from hereon in is going to be argument. I can think of many things to ask, but I think I understand the industry enough to know what might or might not have been the result of that.

THE WITNESS: I would also add, if I may, that I think we have a right to have fears that may have been resolved had we had other answers to our fears. Not always do we have the proper answers.

MR. RIFKIND: We shall argue, at the appropriate time, that the fears were, in fact, fictitious.

THE COURT: I understand.

MR. RIPKIND: If I could have just a minute, I think I could bring this to a close very soon.

(Pause)

Q Mr. Lane, when we were examining PX 135 yesterday, I asked you --

THE COURT: You had better remind us what that is.

MR. RIPKIND: Yes. That is a memorandum to the west coast committee of AGAC dated July 25, 1967 and signed Burton Lane.

Q You were asked, I think both by me and by the Judge, why it was that publishers should prefer to receive performing royalties through performing rights societies, and you pointed out that licensing performing rights is a very complicated business, that there are thousands of users and it would be a great inconvenience to the publisher to have to deal directly.

3M, however, was only one company, not thousands of companies, and I ask you whether you saw great inconvenience, burden and difficulty for the publishers in dealing directly with 3M.

A No, I didn't especially see that.

Q In view of that, why was it that publishers should prefer to obtain their performing rights royalties through

ASCAP or BMI rather than directly from 3M?

A I think that remark was made because I felt that if publishers were receiving their moneys from ASCAP, they could be reasonably assured that they were also getting what they were entitled to.

THE COURT: Also getting what?

THE WITNESS: Getting what they were entitled to; that ASCAP would protect their interests as it was protecting the interests of writer members.

Q Do you know Mr. Chiantia?

A Yes, I do.

Q Is he an able businessman, in your judgment?

A Yes, he is.

Q He is the principal officer of Leeds and Pickwick Publishing Companies?

A Yes.

Q Do you think that, based on your experience with Mr. Chiantia, that he ran a substantial risk of not getting what he was entitled to with 3M?

MR. TOPKIS: If your Honor please, we will join in any encomium --

THE COURT: This was a general statement made here.

MR. RIFKIND: I chose Mr. Chiantia just as an

example of a lot of shrewd businessmen, your Honor.

THE COURT: All right. There is a good argument to make to me, but --

THE WITNESS: I would say that Mr. Chiantia is one of the rare exceptions of publishers whom we consider to be honest and whom we consider to be extremely talented in this field. I wish all publishers were as talented or able.

Q After that encomium I can't ask you about anyone else because it would embarass me.

Do you know, Mr. Lane, how many recording companies record manufacturers who have published your works deal with each year?

MR. TOPKIS: By "your works," you mean Mr. Lane's works?

MR. RIFKIND: Yes.

MR. TOPKIS: How many different companies record his works?

Q Do you have an impression, based on your experience in the music industry, how many record companies the publishing companies that you are familiar with deal with on a regular basis?

MR. TOPKIS: Wait. Wait. Wait. That is a different question, your Honor.

THE COURT: He just said he doesn't know the answer, so it doesn't make any different what the question is.

MR. TOPKIS: Okay. Sold.

A I couldn't tell you the number of record companies that exist, let alone the number that my publisher or publishers have dealt with in the past.

Q So far as you are aware, there may be several hundreds?

A Oh, there are many hundreds, yes.

THE COURT: Am I correct that on whatever accountings you get you look at the bottom line and not so much in the middle?

THE WITNESS: Well, publishers are not accustomed, in their statements to us, to giving us a breakdown. It would be mechanicals. This is one of the things that we've been struggling to get them to do. We would like to have a statement which would list the amount of money each company gave us for each song. But we have not been able to get this.

Q The AGAC auditors, however, would have, presumably, access to the receipts of publishers from the recording companies that those publishers do business with, isn't that right?

A Not being an accountant, I do not know what accountants do when they go in to look at the books. I imagine that if they spot check, I don't know how deeply they are able to go into something, but I guess if they found something wrong somewhere they would look deeper. But what that procedure is, I'm not familiar with.

Q Did you have any discussions with the AGAC council that you participated in as to whether or not direct licensing by publishers of 3M might lead to an undesirable level of competition between publishers seeking to obtain business from 3M?

A I don't understand your question. I'm sorry.

Q Did you consider at all in your discussions at The Guild council whether direct licensing of 3M by publishers might not result in a scramble among publishers to get contracts with 3M and that that might lead to price cutting and competition?

A I can't say that we did discuss it or didn't, but certainly that kind of thing could exist and we were aware of it. I don't remember any specific time when we discussed it.

Q Did you regard that as an undesirable possibility?

A Yes, we would have thought of it that way.

MR. RIFKIND: I have no further questions, your

Honor.

I would like now, however, to offer in evidence PX 125.

THE COURT: Is that the document that Mr. Lane was going to read?

MR. RIFKIND: No. It purports to be on its face, and I have at least with ASCAP a stipulation that it is a memorandum sent by Abel Baer, chairman of the council, to the west coast, or to someone on the west coast, reflecting, or purporting to reflect, a discussion of the council on January 12, 1966.

THE COURT: On the 3M matter?

MR. RIFKIND: Yes.

MISS KEARSE: I object, your Honor. We did object to the stipulation covering this because we have no way of knowing whether it is authentic or not. Mr. Baer was never deposed and it is just a piece of paper.

THE COURT: Can you represent to me what the source of the exhibit is?

MR. RIFKIND: Well, it came from the AGAC files. It was given to us by AGAC's council.

THE COURT: All right. And you have a stipulation with ASCAP?

MR. RIFKIND: It is under the general stipula-

tion of the pretrial order.

THE COURT: I see no reason why we should call a witness for that purpose, if it was received from AGAC in response to -- a subpoena or to questions at a deposition?

MR. RIFKIND: I'm sorry?

THE COURT: How was it solicited?

MR. RIFKIND: A subpoena served on AGAC.

MR. TOPKIS: I have no objection, your Honor.

THE COURT: I am only talking now about authenticity.

MR. TOPKIS: Right. It is hearsay, of course. I do object on that ground.

THE COURT: Isn't this another one of the documents that would be offered for the purpose of establishing that the message was sent?

MR. RIFKIND: That is correct.

MR. TOPKIS: To that we have no objection.

MISS KEARSE: On that question I object on the grounds of relevance.

THE COURT: All right. I think that is a standing objection of yours on that point.

MR. RIFKIND: The witness, I understand, is going to study PX 148. But PX 148, which are the remarks, verbal

or oral of Mr. Lanes' council, which he testified to, referring to a resolution of the council, I now offer in evidence.

THE COURT: I don't think I need it in evidence. Mr. Lane has now testified that he recalls that there was a resolution.

MR. TOPKIS: Yes, he has.

THE COURT: I don't think I need the resolution itself. I mean, I understand. What illumination will I get by seeing the words?

MR. RIFKIND: Do you want a copy of 147, your Honor? It is a report pursuatn to the resolution.

THE COURT: Wait a minute. The report pursuant to the resolution I thought was the thing that Mr. Lane was going to check to see if he could verify.

MR. RIFKIND: It is really a two-stage proposition. There was a resolution of the council, as I understand it. There was then a report by Mr. Lane to his council as to what was going on, and then a report by Mr. Lane prepared for ASCAP's advisory committee.

This is the one to the AGAC council (handing).

THE COURT: Oh. All right, I'll accept the report pursuant to the resolution.

MISS KEARSE: I'm sorry, your Honor. I've

gotten lost. Which number is this?

MR. RIFKIND: PX 147.

THE COURT: 147.

MR. TOPKIS: Is that being offered in evidence again?

MR. RIFKIND: Yes.

THE COURT: This is not the one about which I got exercised just before --

It is?

MR. RIFKIND: It is not. That is 148 that we were talking about, and that we agreed Mr. Lane should study.

THE COURT: There is one that had a whole bunch of whereases.

MR. RIFKIND: 148.

THE COURT: It that material which I meant to observe just a moment ago doesn't seem to me is going to enlighten me in the slightest. If there is a report attached to that somewhere in 148, that's all I am asking Mr. Lane to look at and that's all I will consider accepting.

Getting back to 147, this apparently is a report, so I am told, and I haven't read it because I haven't had the time, and as a report I would receive it subject to

comment of defense counsel.

MR. TOPKIS: As your Honor just said, there is no question but that Mr. Lane reported that there was going to be a report made. It's just not important.

THE COURT: All right. Look, Mr. Topkis, these arguments about things not being important cut both ways, and I sometimes get tired of being in the middle of this. It is very important to Mr. Rifkind. It is totally unimportant to you. If it unimportant, I am not going to be brainwashed or damaged by it. And if it is important, I should look at it.

I realize that doesn't solve all our problems, but there are a lot of iffy documents here. I urgently request counsel not to load me up with more than is in their opinion in good faith necessary, but sometimes that's more than the defense counsel or I believe.

MR. RIFKIND: I think we can all be confident that Mr. Topkis is such a perceptive and able lawyer that he would not be wasting your Honor's time about this document if it were not in fact highly important.

MR. TOPKIS: You are totally wrong on both counts.

THE COURT: I don't accept that argument at all.

(Exhibit PX 147 for identification was received in evidence.)

xxx THE COURT: But I'll decide whether it is or it isn't. It is accepted now.

Now let's give Mr. Lane a couple of minutes.

MISS KEARSE: Is that accepted as limited, your Honor?

THE COURT: Yes, as indicated.

Mr. Lane, would you take that document that you've been asked to study, and Mr. Rifkind will show you where the witness room is, and --

Is there a chair in there?

MR. RIFKIND: Yes.

THE COURT: And would you at your convenience look it over so when we resume, in ten minutes, you can tell us whether you remember it?

All right, we'll take a short recess.

(Recess)

Q I believe, Mr. Lane, the question is do you now have a recollection as to the origin of this report.

THE COURT: Will you give the exhibit number?

Q It is PX 148.

A Your Honor, I must admit I could not read the entire document in the time and I didn't want to hold up the proceedings in the Court.

I don't remember how this document was prepared. It seems that this must have been prepared by a lawyer. John Shulman was the attorney for our Guild at the time.

In just perusing it quickly, there are questions raised in this report, some of which I would certainly have authorized; others I would not. I could not tell, then, what force was at work in the development, what the motivation was in the development of this very extensive report.

I don't know if I am helping or not with my answer.

THE COURT: You are helping somebody. The question is who.

MR. RIFKIND: Neither of us; nobody.

Q Do you recall what instructions, if any, Mr. Shulman was given?

A No.

THE COURT: Let me ask you this:

After you finished doing whatever you did at ASCAP

in making this investigation, I assume you wanted to make your findings known to the Guild.

Are you implying by what you previously said that you instructed or you recall instructing Mr. Shulman -- is that his name, Shulman?

THE WITNESS: Shulman, yes.

THE COURT: -- to prepare a draft of the report for your approval?

THE WITNESS: I don't remember whether that was done or whether I, myself, prepared some report to give to the Council of the AGAC. I don't remember that.

THE COURT: What makes you think this was written by a lawyer?

THE WITNESS: Well, it's not my language and this is, I believe, intended to go to the Writers' Advisory Committee as a means of justifying a future examination of ASCAP.

THE COURT: I see.

THE WITNESS: This is not a report after the examination but before.

Q Is it in a sense an indictment, rather than a verdict? That is, a series of complaints to be investigated.

A I would --

MR. TOPKIS: Your Honor, it is neither. It is a

whole series of statements.

THE COURT: I don't think that Mr. Lane's characterization would mean much to me, or anybody.

Q Is it your recollection hat this was submitted to the Writers' Advisory Committee by you and Mr. Eliscu or by you?

A I don't remember that I had ever seen this document before the day of the deposition.

Q Is it your testimony now that you misspoke at the deposition when you said that this was something prepared by legal counsel for the Guild, based on the findings which you and Mr. Eliscu reached?

MR. TOPKIS: What page are you referring to?

MR. RIFKIND: Page 191 and 189, the ones which were read before.

THE COURT: Do you understand the question, Mr. Lane?

THE WITNESS: I think so.

A I must have misunderatood the question at the deposition because these were not ou- findings. I mean, it's not even intended to be findings.

These are questions raised to be explored and examined.

MR. TOPKIS: If your Honor please, the witness, I

am sure, inadvertently is being misled. His answer reads:

"Q Do you know who did write it?

"A I would imagine legal counsel wrote it, based on findings which Mr. Elisou and I submitted."

THE COURT: Are you laying stress on the word "imagine"?

MR. TOPKIS: Yes.

THE COURT: I don't think Mr. Rifkind intended to mislead by saying what he said.

Do you believe that you misspoke when you then said that you imagined that Mr. Shulman had prepared it on the basis of your examination?

THE WITNESS: Yes. I think, from the answer just read back to me and my looking, after looking at this document, I must have misunderstood the question at the deposition because this is not a finding of our examination, which I thought it was when I looked at it the other day very quickly.

These are questions raised leading, we had hoped, to an examination of ASCAP, to see whether what is claimed here or what is troubling writers here was actually true.

Q Mr. Lane, at the end of this document, on the last page, page 21, is that "this" -- I take it's referring to the Advisory Committee --"should be a Committee not only with

a bark but a bite."

THE COURT: We are still on this problem that bothers Miss Kearse. You are reading from material not in evidence.

MISS KEARSE: Yes, your Honor.

Q I call your attention to the next to last paragraph on page 21. The question is, did the Advisory Committee become or is it a Committee with a bite as well as a bark?

MR. TOPKIS: Well, that presupposes that the Committee referred to in that line is the Advisory Committee and I would suggest that it is not but, rather, if the witness would read the part at the top of the page, he would see it was a Committee that was proposed to be formed and, your Honor, I suggest to you humbly we could not be wasting more time.

Please read this thing and see what it is.

THE COURT: On the one hand you tell me you don't want it in evidence and on the other --

MR. TOPKIS: I don't want it in evidence. I want you to read it and decide it's nonsense and --

THE COURT: I will sustain the objection to the question.

MR. RIFKIND: I will join in Mr. Topkis' request

that you read it and then decide.

THE COURT: I will read it at lunch.

Are you finished?

MR. RIFKIND: Yes.

THE COURT: I would suggest that, instead of having five minutes, unless you are going to have a brief examination, that we go to lunch now and come back at five of two.

(Luncheon recess.)

pgp1

AFTERNOON SESSION

1.55 P.M.

BURTON LANE, resumed.

THE COURT: Gentlemen, I have reviewed Exhibit 148. I do not believe that it has probative value and the offer is rejected.

CROSS EXAMINATION

BY MR. BLUMSTEIN:

Q One thing is clear. We have spoken before?

A Yes.

Q Yesterday Mr. Rifkind asked you some questions about your career and background. I would like to ask you a few more.

First of all, when did you write your first song?

A I think when I was around 11 years old.

Q How did you ever decide to become a songwriter?

A Well, I had started to study music, study the piano, and I think becoming a songwriter was accidental. My father loved popular music and he bought a sheet of a current song of that day, thecurrent hit of that day, and I started to play it, and I was just beginner and I hit a wrong chord, and this led me to other wrong chords, which turned into a song.

Q Could you give me a brief description of your

professional career as a songwriter. What was your first --

A When I was 15 I was signed to a contract by the Schuberts, who were theatrical producers of some importance. I was signed to write the score for a Greenwich Village Follies starring James Barton.

My first lyric writer was a friend of my brother who was going to law school. This show never was produced because the star of the show was taken ill and the show was called off.

Shortly after that, I think I was still 15 or 16 years of age, I was given a contract by Remick; I was a songwriter under contract to them.

Q Remick was a music publisher?

A Right.

I wrote a few songs, nothing of any consequence at that time, and shortly after a year when my contract had expired I wrote some songs for a review starring Clifton Webb, Libby Holeman and Fred Allen called Three's A Crowd. That appeared on Broadway, and Howard Dietz, who was at that time, I think, vice-president of Loew's Incorporated, was associated with M-G-M, wrote the lyrics to these melodies.

I also became the rehearsal pianist for the principals of that show which gave me an opportunity to see how a show was put together.

During that same period I wrote songs for other reviews, and at one particular period I had music in four shows that were playing on Broadway at the same time.

When I was 17 years old I met George and Ira Gershwin. Through my friendship with them I was introduced to E.Y. Harberg. Yip and I started to write together. He was also writing with some other composers at the same time, but he is the Yip Harberg who some years later I wrote Finian's Rainbow with. I have always considered myself a production write, that is one who would write for either theatre or films, as it turned out later in my life. I had one or two songs that were placed with publishers out of shows. They were not connected with any shows.

I think I wrote the first American Rhumba, called Tony's Wife. That was around 1932.

In 1933 Sol Bernstein, who was Irving Berlin's partner in the Irving Berlin Music Publishing Company, sent me, together with the chap I was working with at that time, Harold Adamson, to California. It was a six-week deal with options to see whether we could not make it on the West Coast. I stayed 22 years, and Harold Adamson is still there.

Q I guess you made it.

A I think we made something.

THE COURT: Is he a member of the West Coast Committee?

(Laughter.)

THE WITNESS: He attended some meetings.

A (Continuing) Anyway, from 1933 until I left California in 1954, somewhere between '54 and '55, those years were spent in writing songs for firms with, I would say, three interruptions.

In 1939 Yip Harberg and I wrote the last show that Al Jolson appeared in, Hold On To Your Hats. That show starred Martha Raye and Ruby Keeler and Al Jolson.

In 1944 I wrote a show for Olsen & Johnson called Laughing Room Only. I started that show with Al Dubin, who was a marvelous lyric writer but who became ill and passed away. Out of a fear that I would lose a show I started to do my own lyrics and I ended up doing the lyrics as well as the music for that show.

Q Is that the only time you did your own lyrics?

A Yes. That was the only time, although I have, at various times, helped with lyrics.

In 1946 I wrote Finian's Rainbow with Yip Harberg. The show was produced in 1947.

I moved back to New York in 1954 or 1955, somewhere

in there.

Since living in New York I wrote On A Fair Day You Can See Forever.

Q When was that?

A 1965, I believe.

Q Since 1965 it has appeared on Broadway?

A No.

Q I take it you are not retired?

A No, not at all.

Q There is a gap of 16 years between the time that Finian's Rainbow was produced on Broadway and when On A Clear Day You Can See Forever appeared?

A During that time I was doing films in California.

Q I want to ask you a few questions about the way in which you received distributions from ASCAP. You are aware that a writer in your position has two methods and he can pick one of the receiving distributions from ASCAP?

A Yes. A writer can either choose to be paid only based on current performances or he can choose what is referred to as a four-fund system. The latter is a system which averages out one's performances and one's income over a period of time.

Creative people --

Q Let me ask you this --

A I'm sorry.

Q -- which method have you selected?

A The four-fund method.

Q Give me the reasons why you made that selection.

A Yes.

Creative people have their ups and downs, both as to fertility and as to economic problems. Sometimes we get very hot and we are able to write well, and other times we struggle.

Also, when I refer to economic problems, things have to fall into place for a writer to have a hit. Not only must he write a good song but he also has to get a very good recording of that song, and I know of many cases where wonderful songs were written but either there were no recordings or the recordings that were made of that song were so ineffectual that nothing happened with the song.

2 One example, I turn to Cole Porter. Cole Porter was one of our truly great songwriters. He wrote Begin The Beguine. Begin The Beguine was in a show and nothing ever happened with the song. Then, I think, two or three or four years later, Artie Shaw, who was an outstanding band leader and performing artist, made a recording of Begin The Beguine, which became a great, great hit.

These are the kind of problems the writers have, so that it is important to be able to be in a position to spread our income over a number of years so that we don't have to pay the great amount of taxes all in one year and then be left with nothing through the next four or five or six years, or, in my case, in many more years where I am searching for material to do for a show or might be between pictures, or whatever the reasons are.

Q As president of AGAC did you receive any salary?

A No, I did not. No officer in AGAC receives a salary. We all volunteer our services.

Q What is the term of office as an AGAC president?

A It is for one year.

Q There is an election every year?

A Yes.

Q You served ten one-year terms?

A Yes.

Q You were reelected each year?

A Yes.

Q I will ask you some questions about the AGAC royalty collection.

That plan was your idea, was it not?

A Yes.

Q When did it go into effect?

A I am not positive as to any particular date, but I think it was around 1960 or 1959, somewhere in that area.

Q Tell me what the response of the publishers, music publishers, you dealt with was to the plan.

THE COURT: Refresh my recollection as to the structure of the plan.

THE WITNESS: The plan involves the membership of AGAC authorizing the organization, the Guild, to collect their earnings.

Q Is it all the royalties that the publisher receives or --

A The publisher receives sheet music royalties, mechanical royalties, and synchronization royalties, foreign royalties -- that is foreign from other publishers.

When I became president, one of the overall complaints that we had from our members, we were constantly getting mail from our members, they were not receiving their royalties, or there was a great discrepancy as to what one writer would get and his collaborator would get, and this was a matter of real concern to us.

Also, I realized that we needed updating of our contract with the publishers.

We had difficulty with the publishers in trying to get them to sit down with us, and then, one day, it occurred to me that if we had a better contract we might end up losing more money because we had no way of being sure that what we were entitled to receive we were actually getting, and this led to the development of this collection plan whereby we were able to check all statements necessary to send auditors to the publishers and do an audit.

Q I take it the plan does not contemplate some auditing procedures of publishers?

A Yes, it does.

Q In the years that the plan has been in effect, as a result of these auditing procedures have any additional moneys been collected from the publishers?

A Yes. We have covered somewhere in the area of four million dollars for our members, and these are moneys that our members would never have received if it had not been for this plan.

Q Apart from the letter you wrote to the publishers in connection with 3M, have there been other occasions when you, as president of AGAC have written to a publisher, or publishers, advising them of what you thought was a breach of the AGAC contract?

A Yes. Many times.

Q I show you a document that has been marked as Plaintiff's Exhibit 161 for identification. I ask you whether this is one such letter?

A Yes, it is.

Q You signed it?

A Yes, I did.

Q It was sent to publishers?

A Yes.

MR. BLUMSTEIN: I offer it in evidence.

I suppose it should get a defendant's number.

MR. HRUSKA: It makes a difference to us. You are offering it.

We have no objection.

MISS KEARSE: No objection.

THE COURT: It will be received.

(Defendants' AX 184 received in evidence.)

BY MR. BLUMSTEIN:

Q By the way, this morning I think you said that over the years you, AGAC, had disputes with ASCAP and disputes with the publishers, and so my friend at this end of the table won't feel left out: you also had some disputes with BMI?

A Yes, we did.

Q Have there been any occasions when a publisher has consulted you about theprospects of some special use of all your songs?

THE COURT: His own songs?

MR. BLUMSTEIN: Yes.

A Yes. There was an occasion, or two occasions, actually, that I can remember.

Q Describe those two occasions.

A There was one occasion, when, I believe, it was Universal Pictures that approached my publisher asking for permission to use a song I had written in a film of theirs, and also to be able to use that title as the title of the film.

The other occasion was when a publisher called me and said that a request had been made to them to use a song of mine as a commercial.

Q What song?

A It was How About You -- I Like New York In June, How About You?

Q What was your response to that?

A I declined that offer.

Q For what reason?

A I didn't approve of using a song in a commercial context where they would change the lyrics, and Ifelt it

would hurt the value of the song eventually to do that.

Q By the way, on the first occasion, what was your response to the request of Universal?

A When I heard what the terms were I approved of that.

MR. BLUMSTEIN: I have no further questions.

MISS KEARSE: I have no questions of Mr. Lane.

THE COURT: What a delightful surprise.

MR. RIFKIND: I have one or two questions, your Honor.

REDIRECT EXAMINATION

BY MR. RIFKIND:

Q Mr. Lane, you referred to your collaboration with Harold Adamson?

A Yes.

Q Mr. Adamson is a resident of the West Coast?

A Yes.

Q You said he, from time to time, attended meetings of the West Coast Committee?

A I imagine so. His name I noticed on one or two of the meetings that they had.

THE COURT: In those comminiques?

THE WITNESS: Yes.

Q I show you, again, Plaintiff's Exhibit 123 and I ask you if, lo and behold, About Ben Adamson's name does not

lead all the rest?

MR. TOPKIS: That's true of Abou Ben Adam, but what does that prove?

A His name leads the rest because his last name starts with an A.

Q Is Mr. Adamson in your experience with him, your collaboration with him, given to hysterical responses when problems arise?

A No, but he is not one who attends many meetings either.

Q He attended apparently this one?

A Yes.

Q Have you found him to be a levelheaded and reasonable gentleman?

A Parfectly so.

Q Are there particular individuals who are hysterical on Exhibit 123 as attending the meeting that was reported to the AGAC council who, in your experience, are given to hysterical and unreasonable responses?

MR. TOPKIS: Objection, your Honor.

THE COURT: I do not think that that is proper redirect. I don't recall anything on that on cross-examination.

Q In examining what has now been marked as AX 184,

a letter dated October 2, 1959, it is rather faint on the copy I have, but do you see on the lefthand side of the page, about a third of the way down -- West Coast Committee?

A Yes.

Q And under that is "Sammy Cahn, Chairman"?

A Yes.

Q Who is Sammy Cahn?

A He is a lyric writer.

Q Is he in your professional experience a very prominent and successful lyric writer?

A Oh, yes.

Q Does he not write music for Julie Stein? Has he not over the years?

A He has written lyrics for Julie Stein.

Q And who is Donald Kahn who is listed as co-chairman?

A Donald Kahn's father was Gus Kahn, who is a very successful lyrics writer.

Q Does this letterhead suggest that to you, Mr. Lane, that the west coast committee was somewhat more structured and formal than the ad hoc luncheon group you referred to yesterday?

A Not at all.

Q Is this the official letterhead of The Guild?

A Yes.

MR. RIFKIND: I have no further questions.

THE COURT: Thank you, Mr. Lane. It has been very interesting, what you had to say.

MR. RIFKIND: I am sorry. Something slipped my mind. One last question, your Honor.

Q You referred, Mr. Lane, on cross to your election of the four funds system of ASCAP distributions, and as I understood your testimony it was to the effect that that affords writers a degree of security through the both creative and financial ups and downs of a creative career.

If CBS were to obtain direct licenses from music publishers rather than through ASCAP for its network's music requirements, in your opinion would that have an adverse effect upon the financial security of man like yourself?

A I guess that would depend on the deal. I don't know. I couldn't answer that now.

Q Well, would it diminish the funds' revenues flowing into and therefore out of the four funds system?

MR. TOPKIS: I suggest, your Honor, nobody can know that until they see the fact.

THE COURT: I think any answer Mr. Lane gave would have to be speculative.

Q Let me ask you this, then, Mr. Lane.

THE COURT: You have to assume certain facts, Mr. Rifkind. If you want to do that at some future time, if you find they are indeed facts, that is another matter.

Q Assume for a minute that CTN, CBS Television Network, were to make no further license payments to ASCAP and was to spend what money it spent on music directly with music publishers. Is that a development which, in light of your interest in the four funds system, you would be opposed to?

A Well, this is a theoretical --

Q Yes, based on your experience.

A Well, I would have to answer that that at that time I would seek the very best advice I could get and abide by it, because I'm not an expert in this field and I would need help, and get advice.

Q Do you have any opinion as to what the reaction of The Guild would be to that development?

A I think we would all be in the same boat. We would have to think about this and make a decision when that time came.

If your question implies that we would be against such a thing, we would not be against it before we had a chance to review it and examine it.

MR. RIFKIND: I have no further questions.

THE COURT: I guess this time it is final.

(Witness excused)

MR. HRUSKA: Your Honor, I would like to read

some portions from depositions at this time on the 3M.

THE COURT: These are party depositions?

MR. HRUSKA: Yes. I start with the deposition of Mr. Leon Brettler, who has already been identified for the record.

THE COURT: Can I ask that whoever plans to read depositions have somebody in the witness chair to read the witness' answers? I find that a much more effective way of grasping it.

MR. HRUSKA: Maybe I could ask Mr. Rifkind to read the questions and I'll read the answers.

MR. TOPKIS: If your Honor please, our friends have designated about twenty different passages from Mr. Brettler's deposition, all relating to the 3M incident, so called, and beginning, I think, at page 343 or thereabouts and running on through page 366.

The testimony of Mr. Brettler about the 3M incident actually begins at page 318, goes straight on through to page 366. When I say it begins, I will suggest to your Honor that I am correct because at page 318 the question begins: "Do you remember being approached by somebody from 3M" and so on.

I submit, your Honor, that to have my good friends read a question here and a question there and a question

here, there and everywhere ..ut of these forty pages when we want to designate the whole thing is a waste of time. The way for your Honor to appreciate it best, I submit, is in the total context, and I would propose that we start from the beginning and go to the end of Brettler's testimony.

THE COURT: I will tell you what. I will make a contribution to saving time. I will allow whoever wishes to read at this time whatever it is they are interested in my paying special attention to, but I will, of course, read the whole thing then, if you want me to read the whole thing, so that I will be able to have a perspective.

MR. TOPKIS: I want the whole thing.

THE COURT: I understand that. So this evening I'll read the whole thing. But I want to know what it is that they are calling my attention to. That's all that this amounts to.

MR. TOPKIS: Whatever they don't call your attention to, I think, is part of the context and we want also to call your attention to.

THE COURT: I understand, and I'll do that, and you can either read it all here if you want or I'll do you the favor of reading it.

MR. TOPKIS: Then I would begin at page 318.

THE COURT: That isn't my point, Mr. Topkis, and

I really think that we are making much more of a fuss than is necessary.

I assure you that I will have brought before me, in whatever fashion you want, if you want to read it you may, anything that the plaintiffs do not put in the record from this deposition, but they are entitled to read to me what they want to read to me.

MR. TOPKIS: And I am entitled to read to you, and at the same time, the context. The rule is explicit. I don't want to take up your Honor's time, but I don't want a record ever going up to the Court of Appeals in which there are snippets of theirs appearing and my context does not. I've been a law clerk myself and I know the danger of that.

THE COURT: Well, if you want to, start to read now and whenever they come to what they have in mind I want them to read it.

MR. TOPKIS: I'll be delighted.

If Mr. Hruska will afford me his cooperation, we will begin at page 318.

MR. HRUSKA: No, no.

THE COURT: He wants you to have your own reader, apparently.

MR. TOPKIS: I will be delighted to do that.

MR. HRUSKA: My understanding is that we will read the porition which we think is relevant to your Honor and then, as is the usual procedure, the defendants, if they believe any other portion ought to be read from the deposition, will then read that portion.

The reason we did not plan to read 318 through 342 is because I believe it is cumulative of 343 to 366, where I think the most interesting portion of this deposition is, and it would be no problem for us to read consecutively from 343 to 366.

THE COURT: All right.

MR. HRUSKA: This is highly significant.

THE COURT: Where did you wish to begin?

MR. HRUSKA: We wish to begin at page 343, the last question on the page.

THE COURT: You read from page 318 to 343.

MR. TOPKIS: Shall I do so now or after they are done or backwards?

THE COURT: After they are done. I'll be able to understand it.

MR. TOPKIS: Okay.

THE COURT: start in with page 343.

MR. HRUSKA: We really start at line 22, I think it is.

MR. TOPKIS: 343, line what?

MR. RIFKIND: Four lines from the bottom.

THE COURT: Mr. Brettler is who?

MR. HRUSKA: He is theexecutive vice president of Shapiro, Bernstein, a member of the ASCAP board, a member of the NMPA board, a member of the Harry Fox Agency, and a defendant in this lawsuit.

MISS KEARSE: Is he personally a defendant?

MR. HRUSKA: I am sorry. His publishing company is a defendant in the lawsuit.

MR. RIFKIND: Of which he is executive vice president.

THE COURT: Repeat that a little more slowly.

MR. HRUSKA: He is the executive vice president of Shapiro, Bernstein, which is a defendant.

THE COURT: Right.

MR. HRUSKA: He personally is a member of the ASCAP board, a member of the board of NMPA, which is the National Music Publishers Association, and a member of the board of the Harry Fox Agency, Inc.

THE COURT: Okay. Thank you.

MR. HRUSKA: I might add, your Honor, Shaprio, Bernstein is a publisher which dealt with 3M.

THE COURT: All right.

MR. RIFKIND: (Reading)

"Q Let me put the question to you this way: Did you ever tell Allen Arrow that any pressure had been brought to bear on any music publisher either by other music publishers or by an ASCAP representative in an attempt to discourage the music publisher from issuing a direct license to 3M?

"A Well, I have to answer yes to that. I question the quotation that Allen Arrow used here that one or two or more people said it would be an act of disloyalty. I don't know if Mr. Arrow had this down in his minutes or notes or if that was his recollection. If that was his recollection of eight years ago, it might be something like that. Them is pretty strong words, as we say in Texas.

"Q What is your recollection?

"A As we say in New York -- my recollection of it is that nobody -- well, when I last called Korman and told him we are going to go into this thing, it was relatively close to another ASCAP board meeting and we had a handshake agreement with Allen, and we were even working on some concepts and drafts and so forth and so was Sal. Nobody called me, nobody."

MR. HRUSKA: Sal, your Honor, is Sal Chiantia.

MR. RIFKIND: "In this interim period when this

had been going on, the conversation with Korman and so forth, the next time this came up was at an ASCAP board meeting, which I recollect in a sense was within a week or two of this at which time in the report of counsel to the board, counsel reported and disclosed that 3M have a background system, which he briefly described, and it's come to his attention that a group of ASCAP publishers, including two companies represented on the board, have entered into a direct deal with 3M.

"Again trying to recollect what happened eight years ago, somebody said or insisted who the two publishers were, and Mr. Finkelstein said, 'Shapiro, Bernstein,' and he pointed to me, ' and Leeds Music,' and he pointed to Sal.

"The board consists of 12 writers and 12 publishers. I don't remember how manypeople were there. I don't remember how many people were there. Usually there are 15 or 18. Most of the writers had no knowledge of this thing and were confused, I will say.

"Q Euphemistically?

"A No, quite seriously. This thing comes up and who are the members, and I saw some blank faces. Most of the publishers on the board had already been approached by Allen Arrow.

"In reptrospect -- you asked me who did I speak

to, and as I now recall, I did speak to one outside publishing firm. I spoke to a representative of Chappell & Company.

"Q Ricketts?

"A No. Do you want his name?

"Q Yes.

"A Phil Wattenberg. At that time Mr. Max Dreyfus had just died. He was the operating head of Chappell in New York. I think Mr. Louis Dreyfus had been appointed to the board but hadn't shown up at a meeting or two or may not have been on the board. And Phil Wattenberg and I had been friends, and I know Allen Arrow had contacted Chappell as well and I called Phil Wattenberg and I said, 'Phil, I just want you to know that Shapiro, Bernstein is on the verge of going into this as a direct deal and we will take it from there.'

"That, to the best of my recollection, is the only outside -- other than the conversations with Sal Chiantia -- that was the only conversation I had. That was a conversation I initiated.

"Getting back to the board, it would be misleading to say that you have to understand this in the context which it happened. This came as surprising news to most of the members of the board. Most of the writers and some of

the publishers, that is. I don't know who knew about it in advance through committees and prior conversations with Herman Finkelstein the day of the board meeting and so forth, but I got an impression that from somewhere at one end of the table some cannonballs were coming my way, and I sensed it wasn't the 1812 Overture: 'What are you guys doing? How did this all come about? Why did you license direct? What does all this entail? Don't you have confidence in the legal department?'

"And there was some rapping at the table for order from President Stanley Adams, which is not the first time that Mr. Adams raps for order and not the first time that an energetic conversation has evolved. But let's face it, this did come as a jolt. It was something that was new. It was something that was news and something that was surprising. And there were some comments directed toward both Sal and myself. I can't quote them directly. I don't know because sitting in a room with a lot of static flying around, I don't think if you had interrogated me ten minutes after the board meeting, I couldn't say who said what because everybody was talking at the same time.

"That lasted about ten, fifteen minutes, and we said, 'Listen, the deed is done. We have done it.'

"When Standley had the meeting quieted down and

people were communicating with each other in a more temperate rather than intemperate manner, not all talking at once and having side conversations, STanley got the meeting in control, and I said, 'I would like to explain it in our viewpoint,' and I gave pretty much the explanation that I just gave you, that I saw this as an experimental thing, that if it happened on the scale that 3M expected there were going to be more tapes, 3M would have to go back to ASCAP, and possibly it was a fortunate thing for us to do this, because if the venture flopped, nothing ventured, nothing gain; but if the venture succeeded and this became the new modus operandi of background music, it would come back to ASCAP anyway. And, anyway, it's done.

"I think I reported some of this back to Allen Arrow. I said, 'Allen, you have to consider me a good friend because we took a little' -- how shall I say -- 'a little excitement there at that meeting,' and since I am under oath, I was a little bad boy to my friend Allen Arrow because I took some poetic license, I have to confess to him some day; I exaggerated to him also because I am prone to exaggeration except under oath. I didn't mind ingratiating myself with him further.

"But the facts of the matter are pretty much as I described them. I said I don't exaggerate under oath. I used the expression cannonballs came my way. That was

an exaggeration; actually it was spears and harpoons.

"Q There were heated words at this meeting?

"A Yes, like 'What are you guys doing?'

"Again I have to repeat in the context of how it was announced and the pressure of how it was done. It did take some people by surprise.

"Q Weren't there people in that room who felt that in an area of licensing where ASCAP is competent to act, the individual members of ASCAP including the publishing companies, should not issue direct licenses?

"A Well, I am a board member of ASCAP. I am very concerned with ASCAP activities. I think I am a very loyal board member of ASCAP. I think I am a very dedicated and diligent member of ASCAP.

"Q And you don't feel that way?

"A I took the initiative. I could say I was pressured into it by copout and say I was pressured into it by my company. I am telling the truth. I took the initiative with my company and took the initiative of making this deal directly.

"Q But isn't it fair to say that there are quite a number of ASCAP members who don't feel that way?

"A Members or directors?

"Q Publisher members.

"A I don't know. I just know Allen Arrow didn't have too much trouble lining up 50 ASCAP members because he did this within two or three days: zip, zip, zip, and he got 50. That is, for this particular use."

MR. HRUSKA: I would interpolate here, your Honor, that we would challenge that statement as not being factual.

MR. TOPKIS: I suppose Mr. Hruska is free to challenge anything he wants, but he is free at this time only to read from the deposition.

THE COURT: That's correct.

MR. HRUSKA: Okay.

MR. RIFKIND: (Reading)

Q Were there members at that board meeting who expressed the view in words or substance that in a licensing area where ASCAP is competent to act, individual members should not issue directly licenses?

"A Well, I don't remember this kind of direct quote.

"Q I didn't say it was a direct quote. I said words or substance.

"A How about thoughts of substance? I had Leon Brettler, individually, who had thoughts of substance along those lines, too. I said, 'I wonder if what we are doing here' --

"I don't think it is comparable at all to talk about what we did here with a very limited use involving only 700 songs, only for background, at an experimental rate, for an experimental use. I don't think the magnitude of that decision -- and I know how long it took me to come to that conclusion; I wrestled with this for a week or ten days. You are asking this and you are expecting an answer right off the top of my head. I just can't give you that answer.

"Q Do you believe that a goodly number of ASCAP publisher members would have the feeling right off the bat that they should not license a television network under those circumstances?

"A Well, I think I indicated in my testimony all along here that I personally have the feeling that direct licensing of television networks would be -- I think I used the word -- self-annihilation as an industry. I think what we are talking about in licensing television networks and what we are talking about in what we did in licensing 700 songs to 3M on a limited, experimental basis, on something that might be analogous to television in 1945, when there were just a few sets out and one or two broadcasters -- ASCAP did basically what we did with 3M basically in the early days of television.

"Q You think it is night and day?

"A No, that is only 12 hours apart. I think it is 360 degrees. I think it is more. I think it is grains of sand compared to watermelons.

"Q Yet there were members of the ASCAP board at that meeting you have described who had the feeling that you should not have issued direct licenses to 3M?

"A Did I say that?

"Q I am asking that as a question.

"A With the inflection that you used it came out as a statement.

"Q It's a question.

"A It didn't have the rising inflection.

"Q It's a question.

"A It's difficult for me to really recollect what really transpired and who said what and what who said because the conversation seemed just as I said, what who said and who said what.

"Q I am not asking you for the names of people who said this; I am asking you whether this sort of sentiment was expressed.

"A I think the sentiment was expressed, 'We hope you fellows know what you are doing.'

"Q More than that, Mr. Brettler.

"A Because the announcement was made that it had been done. There was no way the -- the contracts were signed and there was no way of undoing it, and everybody kept saying -- I was saying just 'Calm down. Let me explain it. The deed is done and the contracts have been signed.'

"Q Did anyone express the view in words of substance that what you had done was disloyal to ASCAP?

"A I don't know about the word 'disloyal.' It was expressed to me that what he had done might be a very foolish business venture on our part and that possibly we should have given ASCAP more time to negotiate it; I may

have jumped the gun on this thing and I should have been a little more patient and so forth, words of that nature.

"We are basically gentlemen on the board, the board members. We try to conduct ourselves with some degree of decorum and sensitivity towards the feelings of other people. There is practically no what you might characterize as name-calling at board meetings unless it's done obviously as a jest or a joke.

"The reason I don't think anyone said to me that I was disloyal to ASCAP was because I know what that reaction would be and it would be quite a defensive reaction because I don't in any sense of the word that I was disloyal to them. I would have remembered my response on this.

"Q We are having trouble with the word 'disloyal.'

"A I am not really nit picking with you on this.

"Q Did anyone express to you the sentiment that what you had done was not in the best interests of ASCAP?

"A That sentiment I think was expressed in the round robin of 15 people trying to speak at once to find out what happened and why some people seemed to be upset and some members saying, 'What is this all about? It indicates that our legal department wasn't -- that you fellows thought our legal department wasn't functioning.

Shouldn't you be more patient? Why did you do it?'
This sort of sentiment.

"I don't think really anyone said this is an act of disloyalty. As a matter of fact, if it were considered an act of disloyalty none of us directors have contracts with ASCAP. The way we get to be directors is initially by nomination, and every two years there is a vote taken of the membership. There is weighted voting. The board is not self-perpetuating, and I am reasonably confident that if there was a ground swell or any feeling that what I did or what Mr. Chiantia did or what any other member of the board has done that is an act of disloyalty, malfeasance, any synonym of that nature, I think it is reasonable to expect that at the next election that particular gentleman -- and if he is disloyal I would not call him a gentleman -- that particular person in that case would not find himself on the ASCAP board in consecutive years.

"I am happy to say that I have been reelected at every election to the ASCAP board, and at the last election of the ASCAP board -- by the way, Mr. Chiantia was in an identical position that I was. Mr. Chiantia was in an embarrassing position for another reason. His associate, Mr. Levy, had indicated to a few people, fpr whatever reason there may be between Mr. Chiantia and Mr. Levy, that Leeds

wasn't going to do this when in fact Leeds had made the commitment, had had the handshakes. I don't know if the contracts were signed. I don't know to this day what transpired in their company but there was some commotion about that particular aspect. Lew Levy said Leeds wasn't going to do it, that was an aspect.

If Mr. Chiantia or I were considered disloyal you can bet that word would have seeped through the grapevine and we would not have been reelected to ASCAP. The last election of ASCAP I believe Mr. Chiantia got the highest tally of all us 12 publishers in terms of the number of votes cast for him on the board.

"Q If the CBS Television Network cancelled its ASCAP license and announced that it was going to start obtaining its performance rights needs by direct licensing with music publishers would you think that the publishers who issued such direct performance rights licenses to CBS were being disloyal to ASCAP?

"A I think any publisher has a clear, unqualified right to issue a direct license because our agreement with ASCAP under the consent decree calls for a non-exclusive license.

"Q I am not talking about their rights; I am talking about whether you would feel that the publishers

who did this were being disloyal to ASCAP.

"A I don't feel that they were being disloyal to ASCAP, but I do feel they might be -- let's say, again, knew what they were doing, had analyzed it carefully and didn't just jump in semi-hysterically or imprudently, depending on the circumstances. It might be disloyal to themselves in their best interests.

"Q Is there any question in your mind, Mr. Brettler, as to whether a substantial number of ASCAP publishers would feel that the publishers who had issued direct licenses to CBS were being disloyal to ASCAP?

"A Is there any question in my mind -- I can't put my mind -- we went through this yesterday. I can't speak on behalf of the publishing fraternity. I don't have as good friends and close colleagues of my competitors. The people on the ASCAP board I see once a month. Those on MMPA I see twice a month. With the exception of Sal Chiantia --

"Q Mr. Arrow said at page 232 of the transcript:

'Q Can you recall the conversation in which Mr. Brettler told you that ASCAP publishers, himself included, were being pressured by ASCAP not to deal with 3M?

'A Yes, I recall his saying that to me several times.'

"Did you say this to Mr. Arrow?

"A I was lighting a cigarette."

THE COURT: I didn't hear that.

MR. TOWNLEY: The answer down here is, "I was lighting a cigarette."

"A If Mr. Arrow and I must engage in who has better recall of direct quotations of eight years ago, I don't recall saying just those words. I do recall saying that I wouldn't be surprised if -- I may make people who are friendly with me a little unhappy for a number of reasons, some of them being that I stole the march on some of my colleagues on the board in the competitive nature of this thing. I think that I did something that was very good for my company and I clearly understood that some of the publishers could be considerably irritated by the fact that we did and they didn't.

"Q What were the other reasons? You said for a number of reasons.

"A The number is two.

I think the second meeting I had there with Allen -- we are not used to direct licensing and it hasn't been going on and I don't know what the long-term impact and the long-term repercussions of this thing are, and lo and behold I find eight years later there are apparently long-term impacts and repercussions because you are asking

me intently about this.

"Q Is it your testimony that you never told Allen Arrow that ASCAP was pressuring publisher members, yourself included, with respect to their licensin of 3M?

"A I can categorically state that I got no -- that what I said about the reaction to Bernie Korman, that was my one and only contact with anybody from ASCAP management, and what I testified was correct and that Bernie Korman was completely correct in this and said, 'I can't tell you what to do,' and didn't tell me what to do.

"Q What about other ASCAP publishers?

"A I also testified that I spoke to Phil Wattenbert and he said, 'Thank you for telling me about this, Leon,' and didn't exert any pressure. And that the next evolution or the next exposure I had to anybody in the publishing business was at the ASCAP board, where there was surprise announcement, and for an interval there 15 or 20 people talking at once, side conversations, people sitting next to Sal saying, 'What is it about?' and people sitting next to me saying, 'What is this about?'

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"I think that after the board meeting -- I don't know when after the board meeting -- I told Allen that we had an energetic conversation. I don't remember the exact

words but I pretty much reported back to Allen what I have just told you.

I did have -- I said I had no conversations leading up to that board meeting. I did have a conversation after that board meeting. If you want me to get into that I will get into that.

"Q Please do.

"A I had a conversation with a gentleman by the name of Victor Blau, who was at that time the head of Warner Brothers Publishing Companies. We walked out of the meeting together and he said, 'Come on, Leon, let's have a cup of coffee, I want to talk to you about this thing.' It wasn't like a prearranged meeting. It was accidentally that I happened to be leaving through the door with him about the same time and went down in the elevator with him at about the same time, and Mr. Blau said, 'Boy, I hope you fellows know what you are doing here. This thing doesn't make any sense to me at all and you are setting precedents here on rates and so forth. You young Turks' -- I am not sure the 'young Turks' was the quotation but that was the implication -- 'you young fellows go into these things slap-dash and you better be careful because a lot is riding on what publishers do and how they do it.'

"I remember this conversation because I was a little

awed by Mr. Blau, if not intimidated by him, because he had only been a recent member of the board, a few months before this came up, and he did represent every large company. Mr. Blau is a very forceful and dynamic man, 20-some-odd years older than me. There was a generation gap, and I think out of my own modest way of functioning I am more relaxed with contemporaries of my own age, and I am really happy that you gentlemen on the opposite side of the table here are contemporaries of mine.

"I think frankly I wouldn't be quite as flip and light-hearted with a gray-haired gentleman as I am with a couple of fellows --

"Q Whippersnappers?

"A Yes. I think you understand what I'm getting at. I was more respectful to Mr. Blau, and Mr. Blau was a person who had a very important position with Warner Brothers over the years on the West Coast. He stood there as a new person to me.

I liked being on the ASCAP board. Warner Brothers has a nice slug of votes that I certainly didn't want to go out of my way to lose and I really didn't have any intention of deliberately having a nose-to-nose, head-on confrontation with Mr. Blau when it was not necessary.

Mr. Blau irritated me to no end at that coffee

clatch of ours, and I just said, 'Mr. Blau' -- by that time I called him Victor -- 'Victor, the contracts are signed. You seem pretty upset with me.'

I said, 'I respect you but in all candor, of all the people on the board to take the position you are taking with me it is the most surprising because you come from a company, Warner Brothers, that was the first company in the history of ASCAP that ever was a maverick, that ever licensed direct.' Because I vaguely recalled hearing about the fact that Warner Brothers some time in the '30s, under the guidance of the late Herman Starr, struck out on its own and experimented with direct licensing, and as I get the story, I wasn't there -- it is not terribly germane -- but as I understand the story he came back with his tail between his legs and that venture wasn't as successful as he thought it would be and he did come back to ASCAP.

'You come from a company of Mavericks yourself, so if you don't mind, what is wrong with being an innovater? And what is wrong with being intelligent, as I think I am? And what is wrong with being competitive?'

"And he left and we shook hands and we were friendly ever since. Whatever animosity there may have been at that coffee clatch dissipated by the time we left

the place and he cooled down and I was very happy about it.

"I might have come back to Allen Arrow, and Allen made me slightly confused about the timing of this, and said, 'Oh, boy, Victor Blau laid it on me heavily,' and there might have been implications of disloyalty stemming from that particular conversation.

"To the best of my recollection, and considering that I am under oath and fully recognizing that you are going to call other witnesses who were there and so forth, I am doing my very best to level with you and honestly report the true nature and substance of my best recollections on what really happened, what I said to Allen Arrow, when I said it to him, in the context I said it to him, and I am trying to get on the record in front of you and the record the context in which this announcement was made at the board, the timing of the thing, the sudden jolt, and the fact that I sort of shamefacedly -- if the notes were being taken in Technicolor you might see my face red.

"I did fib a little bit to Allen about some of the problems that I felt. I did feel a little bad because I like to be popular, I like to be everybody's friend, and I don't want to be in a position where 15 or 20 people

get some surprising news and suddenly call me on the carpet and say, 'What are you doing?' and so forth. Life is simpler if you don't have to go through those kinds of afternoons."

THE COURT: Thank you.

MR. HRUSKA: That is al of our testimony.

MR. TOPKIS: If your Honor please, we will begin at page 318, line 8.

The questioning is being done by Mr. Hruska, I believe.

"Q Let's go back to 1964.

Do you remember being approached by somebody from the Minnesota Mining & Manufacturing Company which we will call 3M with respect to the possibility of licensing 3M to use Shapiro Bernstein on 3M tape cartridges and tape players?

"A For background music?

"Q Yes.

"A Yes, I do recall that.

"Q Who approached you from 3M?

"A I got a call from the attorney representing 3M. His name is Allen Arrow. He said 'Leon, I would like to come over and see you, I think I have an interesting idea.'

"I told him to come on over and he came over with an employee from 3M, a gentleman by the name of Ray Lindgren, and for the first time sitting in my office Mr. Voltter I recall was present and the four of us for the first time I heard about the plans 3M had to go into this business.

"Q Did they tell you that they had been talking to the other publishers at that time?

"A I don't recall if he told me they had been talking or they were going to but the gist of the conversation was that they had made up their minds that they wanted to talk to publishers about making direct deals with them.

"Q By this point the negotiations between 3M and
b4 ASCAP had broken down, had they?"

"Q You were aware, I take it, Mr. Brettler, as a member of the ASCAP board that there had been negotiations between 3M and ASCAP prior to the approach made to you for direct license by Messrs. Arrow and Lindgren?

"A I think if you read back what I just said, I said that for the first time I heard about the balance of 3M to go into the background music business when Mr. Arrow came over to my office and we had many years prior to that had friendly and cordial relations.

"Q In other words, the negotiations between 3M and ASCAP had not come to the attention of the ASCAP board of directors prior to the time that Messrs. Arrow and Lindgren approached you?

"A Well, I can only answer that by saying that I think my attendance record at ASCAP is pretty consistent. I remember I had an operation in 1964 and I missed a couple of meetings. I can only say that it came as news to me because I had never been to an ASCAP meeting or heard from anybody that 3M was going into this business and I was or I am quite sure in mind now that -- because I have pretty good recall on this thing -- that that was the first time I heard about it and I even kidded Allen Arrow. I said as friends often do 'You blankety blankety blank, thanks for pulling this on us, why didn't you tell us about this.' I had a more informal working arrangement with Allen than I might have with someone who I just met or if Miss Mingle had come in cold I think it would have been much different. I felt this was -- as they say down south 'family' because we have been good friends socially and otherwise for a number of years.

"Q Do you remember that this meeting took place on October 29, 1964?

"A That great a memory I don't have.

"Q Could you net out this meeting, what was the sum and substance of it? They told you about the project and you were interested, is that about it?

"A If you say so.

"Q I don't know. I am asking you.

"A I was more interested. I was impressed.

"Q Did you ask Arrow whether he had negotiated with ASCAP?

"A Yes, Allen told me that they had been negotiating with ASCAP and he had been running into problems. I asked him what the nature of the problems were. I had a conversation with him about that. I said that it all comes as news to me. I felt, quite honestly, irritated about it. I was irritated at Allen that he hadn't mentioned it to me. I found out these negotiations were going on seven or eight months and Allen said, and correctly so, and I admire him for it, he has never used his friendship with me or anybody else on the board to try to influence one of his projects through because he has many clients in the music business, nor has he divulged something that is coming up of a confidential nature until the time comes to tell everybody.

"He said, 'I have Mr. Lindgren, we are going to make a sweep around New York and see what we can do about getting publishers involved directly.'

"Q Did he say that you were the first publisher he had contacted?

"A I honestly don't remember. If I wasn't the first, I was one of the first.

"Q What did he tell you was the problem in the 3M-ASCAP negotiations?

"A You are asking me about details of a conversation that took place six, seven, eight years ago and two months in October. I don't think I have accurate total recall in this, but I am going to try to answer this as best I can recollect it.

My recollection of it is that the people he was negotiating with at ASCAP, and this is the legal department of ASCAP, which logically would be the first one to receive communications on the problem of this matter, seemed stymied by the newness of the idea. The newness of the idea involved the fact that 3M planned to sell the tapes to a user which incorporated a performing grant for a three-year period of time.

There was a big problem in the minds of ASCAP about what happens after the three years, how do you police it. There was another big problem that the consent decree requires ASCAP to quote comparable licenses for comparable uses and there were no directly comparable uses.

"There were some reasonably comparative uses, other background services, the wire services, the Muzaks, they were struggling with some form of analysis to figure out how you can compare a fee for the sale of these tapes with the percentage fee that they were getting from other background users.

There were some delays that Allen Arrow characterized as unduly long between letters.

"Q How about the blanket aspect of the license that ASCAP wanted to issue?

"Mr. Blumstein: Could you clarify that? What do you mean by blanket aspect?

"Mr. Hruska: I gather 3M was interested in a license to specific compositions and ASCAP was interested in a license to the entire repertory.

"Mr. Blumstein: That is what you gather. I don't know whether it's accurate or not.

"Q Was that part of the problem?

"A I don't know whether it's accurate or not but my understanding of the way ASCAP can license under the consent decree is that ASCAP can't deal on specific songs. It can only deal in bulk and has to offer in a situation like this an arrangement where the user can come in and select from the entire ASCAP repertory what he wants to use.

"Q Unless the member in interest consents?

"A Yes, a technicality that--

"Q A technicality that what-- that is not realistic?

"A That is realistic. It's a technicality that I didn't get into that I only vaguely remember. Thank you. If I wave my hand it's because I am trying to focus into my recollection of this thing.

I also recollect that the early stages of this thing, 3M at that point had no production line to make the recorders, had no master tapes. They were just lining up their patents and concepts about going into this thing and really had to know what the cost of music would be so that they could get on with their market research and evolve the total cost of the tapes and units and figure out before they made an expenditure of millions of dollars to go into production what their costs were going to be so they could figure out what their profits and gross sales would be and do whatever 3M does by way of market research. So I understood quickly that it was of great importance to 3M to get some sort of quotation from somebody on the use of music.

"Q After this conversation with Arrow --

"A Let me finish.

"Q I am sorry.

"A In those early days when Arrow and Lindgren were talking to ASCAP 3M -- I think you said before 3M wanted to use 700 specific songs. I am not sure you are correct on that. I think they knew they wanted to have a tape that would contain 700 songs but I am reasonably certain that at that point no one really got into what songs they would use, what the sequence would be. They just knew they had a design of a cartride that would carry 700 songs and they were going to ask ASCAP to have the repertory available under some contractual arrangement.

jbjb-1 "Brettler

"Q After your first conversation with Arrow and Lindgren did you have any conversations with any other music publishers regarding the possibility of those publishers granting licenses to 3M?

"A I told Mr. Arrow that I found this very interesting and I hoped that in one way of another my company was going to get into this project and the first thing I wanted to do was check with ASCAP. Allen said "What do you think about this' and I said 'Well, I can't make a commitment now, I really want to find out what is really happening here.'

"And I did check with ASCAP I think that very day and received the explanation that I just gave you as to what the problems were and why it was hanging in mid-air and I responded by saying 'Listen, I don't think this thing should hang in mid-air because this is an experimental use. We are hanging up a big company.'

"Being on the public relations committee I didn't think it was good for ASCAP to get into these hassles. I didn't think it was earth shaking, it's background music, it's experimental. I think we owe it to 3M to get cracking on this.

"I heard the counterargument 'Leon, we don't think it's that simple. The consent decree, this, that, we

have to be careful and that rate that they are offering of one cent a year for three years or three-cents performance seems quite low and unacceptable to us,' and so forth, and we went back and forth.

"Q What publishers did you talk to?

"A That was my first recollection of what I did.

"Q The ASCAP conversations?

"A Right.

"Q Who was it at ASCAP that you discussed this with?

"A Bernard Korman.

"Q Did you talk with Mr. Pinkelstein?

"A No.

"Q Paul Marks?

"A Just Bernard Korman. THat is the man I spoke with.

"Q What publishers did you talk to?

"A I called Allen Arnow, and I think he came to our office in the morning or early afternoon, and I said 'Allen, my boy, how are you doing?' and he said, ' I think I have some commitments lined up.' I forget the names he gave me. He said that he knew he could deliver Frank Loesser, his client, and he read off Gene Goodman -- 'the people that are in my camp will certainly go.' I spoke to Sal Chiantia. Sal is very interested in this thing. Sal and I know each other a long time. We have a vicious

competitive instinct toward each other's firm when we are talking to an A and R man about his catalog or mine, but underneath it all we are friends who respect each other and know each other quite a while.

"I said, 'Sal, what the hell do you think abou this thing?' and Sal and I had a conversation about it. And as this thing evolved I said to Sal,'I am inclined to go along with them because I have a feeling if we don't you and I are going to be standing out there in the snow looking at the warm bodies luxuriating in this thing. And why not? It looks like it's going to be hung up at ASCAP.' And I wasn't able to reach any conclusion with Korman. I disagreed with them. And Sal and I made our own analysis of this thing. It was new to us. We weren't as concerned about some of the problems that ASCAP had and we said that if we do this directly we don't have to worry about the consent decree and some of these other problems that seem to have ASCAP up in the air.

"As we analyzed it further we said, 'There are only going to be 700 songs here, and if they pick 700 songs without yours or mine we have no chance at all of getting in this thing. It's completely different than the ordinary user who comes in and may use this and may use that. These are going on tape, they aregoing to be recorded once and

that is it and that is the program.' I said that 'I am glad you are interested in this, Sal, because frankly I am leaning very heavily in going.'

"And I sort of disagreed with what I had heard from Mr. Korman that the rate was absurdedly low because the way Allen Arrow explained it to me the uses that these 3M machines would have were really not comparable with the uses of other wired background music services that had been going on in this country for years, from 1940 on. The big users, the big hotels, the big factories and big supermarkets, they were going to have background music. The way I saw it this machine was going to be sold to relatively small organizations and users of background music, and by that we were thinking of Allen Arrow and Lindgren had explained that this would mean a location such as doctors' offices, dentists' offices, restaurants, small stores. It was unlikely and improbable that they were going to sell these tapes to a General Motors manufacturing plant and have the thing wired through the building.

"3M really didn't see much market in competing with the established Muzak in other locations because they had long-term contracts, with forfeitures and so forth, and there would be really no advantage to anybody using

Muzak, which had a wider scope and was an efficient organization, to buy one of these things.

"The only practical source market for the machines were people that were playing music now which would entail a restaurant which was playing a radio -- it did have those nagging, annoying commercials which were sort of disturbing to dining comfort. And when the dentist was drilling on your upper molar it might be upsetting to hear about Crest toothpaste.

"Quite seriously it was an attractive proposition and I saw it immediately as an attractive proposition. Therefore, I wasn't so concerned about the one-cent rate because I really felt that this device 3M had, this prog-am they had, was going to open up markets. The music was being used anyway and we weren't getting a dime by and large. We don't get a dime when a restaurant uses a commercial broadcast live in the establishment. We get that money from the broadcaster but we don't get it from the restaurant user. There is well established law on that subject.

"But if we get into --"

MR. TOPKIS: And the witness was directed not to get into the area of the law.

THE COURT: It's hard to keep him out of it.

"Q What other publishers did you talk to about this

3M project?

"A I don't think I spoke to anybody else in those initial stages that i recall. It may be possible I did.

"Q How about in later stages?

"A I think we are going to lose the continuity of this thing.

"By now I had worked my analysis of this thing up and Mr. Voltter agreed that if Allen Arrow was lining up really a sufficient contingent of publishers, and I trusted that he was giving me the straight facts on it and it looked like he was going to be able to make a direct deal, I said to Allen that I think he could count us in. 'It's not a firm commitment, but when it looks like there is a no-nonsense way to go, I think we will have a deal.'

"I communicated that to Chiantia and also to Bernie Korman. I said, 'Bernie, I have a difficult decision to make but unless ASCAP can close this thing fairly soon I don't think Arrow is kidding around, I think he has a group of publishers lined up where he can scrounge out here and there 700 songs that are more than suitable for background music. And the position I find myself in is that if ASCAP doesn't make the deal and these other publishers do make the deal, my company is locked out f

it, and I just can't afford -- wearing my first-and-foremost hat, that of being an officer of my company -- I can't afford to take the chance of dillydallying here and find that my company is not participating in this project.'

"I called Bernie Korman back again. I think I had this conversation with him at lunch. I called him back a day or so later and I said, 'Bernie, we are getting very close to a handshake on it.' And I knew Mr. Chiantia felt the same way because we mentioned to each other on the phone. I said, 'Sal, I am getting close to it,' and he said, 'So am I, Leon.'

"We agreed with each other's position. We knew the list of names of the other publishers that were involved, none of whom I consulted with because I had no reason to. I really did know that Allen Arrow would not deceive me or kid me about this.

"And the day came -- and I don't remember just at what point, a week or two or three, something of that magnitude -- I shook hands with Allen and I said, 'Count us in, but before you count us in let's talk about the deal. You offered me something before. If you don't mind, I think we ought to be able to do a lot better with you considering the scope and significance of our catalog. It will make your job easier. And I want a bigger guarantee

on the advance and I want a bigger guarantee of the number of songs you are going to use.'

"And he said, 'I don't think there is any problem about that at all because we are really anxious to get some big catalogs in here and have as wide a choice as possible of big standards and things that lend themselves to background music.'

"And I said, 'Allen, we have a deal.'

"I called Bernard Korman back and said, "Bernie, I want you to know, and relay this around, that we just agreed with Allen Arrow that we are going to enter into a deal with him.'

"That is the genesis of it.

"Q Let's go back a bit. You said during your discussion with Korman, either at lunch or on the telephone, that you had a difficult decision to make. That is in the context of whether you should go along with the 3M proposition. Why was it a difficult decision?

"A Well, it was a difficult decision because time seemed to be of the essence on this. Allen was pressing that 3M wanted to go ahead with this, wanted to know what the figures would be or basically would possibly abandon the whole thing.

"I said it's difficult to know whether I should

go into this directly or want and see what ASCAP is going to do. Maybe ASCAP will negotiate a higher rate and I might look -- not look but I might be foolish to have gone into this and agreed to the rate that 3M posed without a strong upward negotiation.

"I did exert some pressure on Allen. I said, 'Come on, Allen,' irate, 'what can we do about increasing?'

"And'That is what the rate has to be, and with you or without you we are going to put the rate across.

"He gave me some pretty solid reasoning, the facts I went through before about the kinds of uses and so forth, and the fact that it is more conceivable that a user would buy; after a few months of one tape 3M was putting out a 700 series, melodic and rhythmic, they were putting out two tapes, that the user would probably buy two tapes. That meant we were getting two cents per song.

"Q If 3M had made a deal with ASCAP, Shapiro, Bernstein would not have had a guarantee as to the number of Shapiro, Bernstein songs that would be on the tape.

"A Correct.

"Q The chances are there would have been fewer Shapiro, Bernstein songs on the tape.

"A Correct.

"Q So I come back to my question as to why this was a difficult decision.

"A When it was a difficult decision Mr. Arrow initially gave us a guarantee of using 25 songs. We migh have gotten 15, 18 through ASCAP.

"Q What did you end up with as a guarantee?

"A One hundred songs.

"Q There again --

"A When I got the 100 songs, then it wasn't difficult. That is when I shook hands with him. I didn't have this guarantee.

"I also explained to Allen Arrow, when I gave him a frank analysis of my reasons for not shaking hands immediately, that I didn't know that I might not be better off waiting to see what would happen with ASCAP, that I was not too happy about this rate.

"Q What was Kerman's reaction to these things that you told him?

"A Quite proper, quite correct. 'Leon, I can't tell you what to do. I am sorry that you seem to be upset about the prolonged negotiations but I am quite sure that the position ASCAP has taken in concern of the benefit and welfare of all its members and in connection with all the problems of the consent decree. It is correct we have been

having problems with Mr. Arrow and company in these negotiations. We are not the only ones who seem to be on dead center on this thing.'

"He stressed things in the nature of 'thank you for keeping me posted and I appreciate your calling.' And 'I can't tell you what to do and you have to make up your own mind on this matter.'

"Q Let me read a portion of Mr. Arrow's testimony as a predicate for my next question:

'We were told by some of the publishers who did license 3M that it had been made clear to them that this was an actof disloyalty to ASCAP.

'Q Which publishers told you this?

'A Mr. Brettler of Shapiro, Bernstein, Mr. Levy of Leeds Music. These are the only two I can recall.'

"A In this testimony did he say when I told him this?

"Q The immediately preceding testimony concerns a document marked in this examination as Exhibit 42, PX42. When I say this examination I mean the Arrow examination. The date of that document was December 21, '64, and the portion of the document read immediately prior to this testimony that Arrow gave was:

'At the time we left ASCAP' -- this is the 3M

people -- 'Bernard Korman said he thought it was wise to approach the individual members of ASCAP. Since that time we have learned that ASCAP has been approaching its own members to advise them not to deal with 3M.'

"Then the question was:

'Q From whom did you learn that ASCAP was approaching its own members and advising them not to deal with 3M?

'A We were told by some of the publishers who did license 3M that it had been made clear to them that this was an act of disloyalty to ASCAP.

' 'Q Which publishers told you this?

'A Mr. Brettler of Shapiro, Bernstein.'

"A Before you read this to me and before I had any knowledge that this specific testimony existed, I just testified again under oath that when I told Mr. Korman this, Mr. Korman behaved in a quite correct manner and Mr. Korman said, 'Leon, you are at liberty to do whatever you see fit in this matter.'"

MR. TOPKIS: Mr. Blumstein interrupted and said; "What is the pending question?"

"THE WITNESS: I want to ask a question. When Mr. Arrow made this quote he told me he looked in the diary

to get the October 29th date, Did he look into the diary to get that quote, 'an act of disloyalty,' or did he look into his mind to get that quote?

"Q This conversation was not necessarily a conversation that took place on October 29th. I gather this is a later conversation.

"Let me put the question to you this way: Did you ever tell Alle[illegible]rrow --"

MR. HRUSKA: We read this part.

MR. TOPKIS: Yes, that's right.

THE COURT: How much longer will the depositions take?

MR. HRUSKA: The other readings are quite brief.

THE COURT: All right.

MR. HRUSKA: Perhaps I could read t[illegible] questions and answers, myself, since they are brief.

THE COURT: All right.

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MR. HRUSKA: I will now read, your Honor, from the deposition of Salvatore Chiantia.

I will start at page 136, line 4:

"Q Am I right in thinking there was a reorganization in some sense of the management structure which Leeds was art of on January 1, 1965?

"A Only in that I was now required to report to Bernie Adams rather than to Lou Levy."

I now go to the bottom of the page:

"Q Here you were late 1964, early 1965, negotiating a direct arrangement with 3M.

"Mr. Levy, as I understand it, was hopeful that as an ASCAP arrangement --

"A After 1965, after January 1, 1965.

"Q After 1965 --

"A After January 1, 1965. I can't fix the time exactly but sometime he came to me and said, 'I think ASCAP is going to make a deal. Why don't we hold off and see what happens?'

"That is generally what he said."

Page 139, top of the page, line 2:

"Q What view did Mr. Adams express?

"A Mr. Adams said to me, if it is possible that ASCAP could license, I prefer that they do it."

MR. TOPKIS: Why not read the rest of the answer?

MR. HRUSKA: Yes (reading):

"I told Mr. Adams at that time, I didn't think that ASCAP was going to license."

I now go to page 145, line 21:

"Q Did any publisher, any representative of any publisher with whom you spoke indicate to you that he thought it a mistake to enter into this arrangement with 3"?

"A There were obviously publishers who thought it was a mistake, and obviously some of them must have expressed it to me.

"Q We deal in theobvious. Can you remember any publisher who expressed that way?

"A Jack Bregman.

"Q With which company is he?

"A Bregman Vacco & Conn.

"Q What did Mr. Bregman say?

"A Mr. Bregman got very emotional about it and said it was a mistake, gave no real reasons.

"Q Can you elaborate on what it is he did say?

"A He just said it was a mistake.

"Q A mistake in what respect?

"A A mistake to leave ASCAP and license on our own."

Then I go to page 153, line 4:

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"Q You testified just a moment ago that you and Mr. Brettler agreed or shared the view that it would produce a lot of money?

"A Yes.

"Q What do you mean by a lot or what did you mean by a lot?

"A Two, three, $400,000, $500,000.

"Q For Leeds?

"A That's right.

"Q And a like amount of money for Shapiro-Bernstein?

"A Depending on the number of uses, yes."

Thank you, your Honor.

MR. TOPKIS: Your Honor, I will begin at page 3 and identify Mr. Chiantia:

"Q What is your occupation?

"A I am an executive with MCA.

"Q What is your title?

"A I am president of the music division.

"Q Do you hold any other offices?

"A I am also a corporate vice president.

"Q Of MCA?

"A Of MCA, Inc. That's correct.

"Q Any others?

"A I hold other titles, yes. Outside of MCA.

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"Q What are they?

"A I am president of the National Music Publishers Association, vice president of ASCAP and a member of both boards.

"Q That is, the board of NMPA and ASCAP?

"A That's right."

Now we will go to page 113, line 22:

"Q Do you know a gentleman named Allen Arrow?

"A Yes.

"Q Who is Mr. Arrow?

"A He is an attorney.

"Q How well do you know him?

"A Very well.

"Q Have you had business dealings with him?

"A Yes."

We will now go to page 115, line 7:

"Q Did you have dealings with Mr. Arrow in relationship to Minnesota Mining?

"A Yes, I did.

"Q What is the first occasion at which you had such dealings?

"A I can't fix the time for you.

"Q Earlier than 1964?

"A Earlier than the time I signed the agreement,

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whenever that was.

"Q What agreement are you referring to?

"A The Mennesota Mining agreement.

"Q The agreement to do what?

"A The agreement to permit Minnesota Mining to use certain of our compositions in their background music program.

"Q Let me show you a document that has previously been marked as Plaintiff's Exhibit 52 for identification and ask if that is the agreement to which you are referring.

"A Without looking at it, I see my initials, I see my signature. That must be the agreement.

"Q Have you had more than one agreement with Minnesota Mining?

"A Yes.

"Q Were they all related to their background music tapes?

"A Yes.

"Q And the use of your music?

"A Yes.

"Q That agreement you signed on behalf of Leeds?

"A That's co-rect, and Pickwick.

"Q That agreement is dated on its face March 1,1965.

"Do you recall when in fact that agreement was

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reached?

"The agreement is dated March 1, 1965.

"A Sometime before that, I don't know how long before before that but certainly before that.

"Q Do you recall when the subject matter of that agreement was first brought to your attention?

"A I would judge sometime in 1964.

"Q By whom?

"A By Allen Arrow.

"Q Did he visit you at your office?

"A He called me on the telephone. He must have visited me. I don't remember. But we did have discussions.

"Q Discussions in which he requested permission to use Leeds and Pickwick music for 3M?

"A Yes, defined the purpose of the program and asked if I would be interested in licensing our compositions to Minnesota Mining.

"Q Was that the first occasion on which you had heard of 3M's program?

"A I don't remember.

"Q Am I right in understanding that the agreement which you reached with Mr. Arrow conveys not only mechanical rights or whatever the type equivalent of mechanical

rights is, but also performance rights?

"A Yes.

"Q Did Mr.Arrow explain to you why he was coming to you for performance rights?

"A Yes.

"Q What did you say and what did he say?

"A He indicated to me he was having some difficulty getting a performance rights license, at least making an arrangement with ASCAP.

"Q Did he tell you what the nature of that difficulty was?

"A Yes, as I recall it, it had something to do with not being able to arrive at a satisfactory rate to be paid?

"Q Any other problems?

"A Not that I recall.

"Q Did you make any inquiry at that time with ASCAP as to what the nature of the difficulties between 3M and ASCAP were?

"A Yes, I did.

"Q What inquiry did you make and of whom?

"A I called Mr. Korman, as I recall, and asked for permission to come and see Mr. Korman.

"Q Did he grant permission?

"A Certainly. He is very magnaminous with his time

and with his wisdom.

"Q Was this in late 1964?

"A I can't fix the date.

"Q It was certainly before March, 1965?

"A Yes, before I signed that agreement.

"Q Did you visit Mr. Korman?

"A Yes. I did.

"Q Were you seeking legal advice from Mr. Korman?

"A No.

"Q What did you say to Mr. Korman and what did Mr. Korman say to you?

"A Very simply, I asked Mr. Korman why they were having such difficulty in coming to some agreement with Minnesota Mining.

"Q What did Mr. Korman say?

"A He told me at that time it was a completely new use in background music, that for the first time they were confronted with a use in which the machine giving the performance was being sold rather than leased.

"And he had some concern about the manner in which they would be able to effect collection of performing fees after the initial period of the contract.

"Q How long was the initial period of the contract?

"A The contract which was being proposed to me at that

time was about three years.

"Q Did those problems trouble you?

"A I gave them a great deal of thought, yes, of course.

"Q But you were capable of solving them ultimately?

"A I thought ultimately the problem would be solved.

"Q And was it?

"A No unfortunately no.

"Q Did you tell Mr. Korman that you had been approached by Mr. Arrow?

"A Yes.

"Q And the nature of Mr. Arrow's requests?

"A Yes, I did.

"Q Did Mr. Korman express a view as to what you should do?

"A Absolutely not.

"Q Did he express such a view on any occasion?

"A Absolutely not.

"Q Did Mr. Korman indicate to you that he had discussed the 3M proposal with anyone else?

"A Not that I recall.

"Q He did not indicate to you that he had discussed it with other publishers?

"A Not that I recall.

"Q Did he indicate to you he had discussed it with Mr. Finkelstein?

"A I don't remember that at all.

"Q Did he indicate to you any considerations as to why it might be inadvisable for Leeds or Pickwick to enter into the proposal that Mr. Arrow was making to you?

"A Nothing beyond what I have already told you. He expressed to me his concern and I took this concern into consideration and I told Mr. Korman at that time that I was considering going into the deal.

"Q That concern, as I recall your saying, was that this was a new use and that it involved the sale of of the machine.

"Were there any other areas of concern?

"A Well, the sale of the machine involved a problem in the eventual policing of the performing rights. That was his concern."

Let's go to 124, line 6:

"Q Mr. Chiantia, let me show you a letter dated December 3, 1964, signed by Allen Arrow to you, and I ask you whether that helps you place the time you began your discussions with Mr. Arrow.

"A I don't understand the question.

"Q Did you receive that letter?

"A Yes.

"Q Does that indicate to you that at least by December 3, 1964, your discussions with him were well along the road?

"A Oh, yes."

Page 134, line 11:

"Q Do you know a gentleman named Berle Adams?

"A Yes, I do.

"Q Who is he?

"A He was a corporate vice president of MCA.

"Q Does he have an area of responsibility within MCA?

"A No longer.

"Q Did he in 1965?

"A Yes.

"Q What was the area of his responsibility?

"A He was my immediate superior. In other words, he was the gentleman to whom I reported.

"Q Was he in charge of the music publishing group?

"A He had a general responsibility for music publishing, records, television, many areas.

"Q Do you know a gentleman named Lou Levy?

"A Yes.

"Q Who is Mr. Levy?

"A Mr. Levy was the president of Leeds Music.

"Q Is Lou his proper first name?

"A L-o-u.

"Q Was he president of Leeds Music prior to its acquisition by MCA?

"A Yes.

"A After the acquisition by MCA of Leeds, what was his position?

"A Vice president

"Q Vice president of --

"A Leeds Music.

"Q You told us yesterday MCA acquired Leeds January 1, 1965.

"A That's correct.

"Q So that your discussions with Mr. Arrow with respect to 3M preceded that acquisition?

"A That's correct.

"Q Following the acquisition, did there come a time when Mr. Levy or Mr. Adams expressed to you concern as to the desirability of the negotiations you were engaged in with 3M?

"A I don't think I understand that question.

"Q Am I right in thinking there was a reorganization in some sense of the management structure which Leeds

was part of on January 1, 1965?

"A Only in that I was now required to report to Berle Adams rather than to Lou Levy."

I think we have read what there follows.

Unfortunately, your Honor, the problem is keeping this in context. May I just go straight through? It involves rereading a few questions and answers but it will be easier.

THE COURT: Where are you picking up again?

MR. TOPKIS: I will continue on from where I was.

THE COURT: Where would you pick up otherwise?

MR. TOPKIS: Three questions.

THE COURT: All right.

MR. TOPKIS: (Reading) "Q Prior to January 1, 1965, had you discussed with Mr. Levy your negotiations with 3M?

"A Yes, I had.

"Q Had he expressed any opinion about them?

"A Yes, he did.

"Q What opinion did he express?

"A He thought we should go ahead.

"Q After January 1, 1965, did he express to you any doubt as to his original opinion?

"A No, he thought the deal should be made and he thought ASCAP would eventually make the deal.

"Q Did he think the deal would be made by Leeds or Pickwick?

"A He thought a deal should be made, yes. But he was still holding to the hope ASCAP would come to some arrangement with Minnesota Mining.

"Q Here you were late 1964, early 1965, negotiating a direct arrangement with 3M.

"Mr. Levy, as I understand it, was hopeful that as an ASCAP arrangement --

"A After 1965, after January 1, 1965.

"Q After 1965 --

"A After January 1, 1965. I can't fix the time exactly but sometime he came to me and said, 'I think ASCAP is going to make a deal. Why don't we hold off and see what happens?'

"That is generally what he said.

"Q Did he explain to you what the basis of that hope was?

"A No.

"Q Did you ask him?

"A Yes, I did.

"Q He would not tell you?

"A Not that he would not tell me. He didn't quite

comprehend.

"Q He did not comprehend your question?

"A He did not give me an explanation which made any sense to me at the time.

"Q Did he indicate to you that he had spoken to anyone else with respect to whether or not ASCAP would make a deal with 3M?

"A He apparently had spoken to someone else but I don't remember who.

"Q Did he say to you he had spoken to anyone else?

"A He must have gotten the information somewhere.

"Q Did he indicate to you that he had been in touch with anyone at ASCAP?

"A He was a member of the board of ASCAP.

"Q Did he indicate to you that the basis for his view was what he had heard or had been told at the ASCAP board?

"A No, he did not.

"Q Or by other members of the ASCAP board?

"A Perhaps.

"Q Perhaps he indicated that to you?

"A Yes. I don't remember.

"Q Did you and Mr. Levy and Mr. Adams discuss the 3M negotiations?

"A Never together, no.

"Q Did you and Mr. Adams discuss them?

"A Yes.

"Q This would be after January 1, 1965?

"A Right.

"Q What view did Mr. Adams express?

"A Mr. Adams said to me, if it is possible that ASCAP could license, I prefer that they do it.

"I told Mr. Adams at that time, I didn't think that ASCAP was going to license.

"Q Did Mr. Adams indicate to you why he preferred it that ASCAP did the licensing?

"A No not exactly.

"Q Did you believe that you knew why Mr. Adams preferred to have ASCAP do the licensing?

"A No.

"Q Did you ask him why do you prefer that?

"A Will you give me a moment to think about it?

"Q Sure.

"A I really don't remember.

"Q At this point in time, that is the time of your discussion with Mr. Adams, you were on the road at least to reaching an agreement with Mr. Arrow?

"A That's correct.

"Q On terms which you regarded as attractive?

"A I thought so, yes.

"Q Did you have any reason to believe that the terms which ASCAP might ultimately reach with 3M would be more attractive for Leeds or Pickwick?

"A Did I personally have that impression?

"Q Yes.

"A No, I never had that impression.

"Q Did you have the impression that they would be less attractive?

"A I had no impression. I was satisfied with the deal that Minnesota Mining, that was given to me and I was satisfied ASCAP was not going to make the deal.

"I think I have answered that question.

"Q Did you say in words or in substance to either Mr. Levy or to Mr. Adams, 'Since I have no reason to believe that ASCAP is going to produce a better deal for me, I think we should go forward with this deal,' that is with the direct deal between Leeds, Pickwick and 3M?

"A My recollection is that in discussing this with Mr. Adams, I indicated to yoMr. Adams my opinion that this was a good deal, that this was something we should get involved in. That's it.

"Q Did you believe that it was a good deal because it would be a profitable deal for Leeds?

"A Yes.

"Q And for Leeds authors and composers?

"A Of course.

"Q Did you suggest to Mr. Adams or to Mr. Levy that you would be derelect in your duty not only to your own company but also to the authors and composers it represented and published if it didn't press ahead and make this deal?

"A I don't have that same flair for the dramatic that you do.

"I merely told Mr. Adams I thought it was a good deal and we should make it.

"Q Do you recall attending a meeting attended by Mr. Adams, Mr.Arrow and yourself?

"A Yes, I do.

"Q Do you recall about when that meeting occurred?

"A Sometime after January.

"Q Would it be late January, 1965?

"A It could have been anytime prior to the actual signing of the agreement. I just don't remember.

"Q What was the occasion for that meeting?

"A I told Mr. Adams that if he really felt there was a possibility ASCAP would make the deal, I would suggest he speak to Mr. Arrow and get Mr. Arrow's point of view.

"At the same time, he could avail himself to the opportunity of listening to Mr. Arrow relate the

the wonders of this deal, which we did.

"Q At the time of that meeting, did you understand that Mr. Adams was considering not proceeding on a Leeds-3M arrangement?

"A I would assume he was considering that. He was also considering doing it as well.

"Q At that meeting with Mr. Arrow, did Mr. Arrow say, in owrds or in substance, but we already have a deal, so why are we doing this?

"A I would relate to you what I remember of that meeting.

"I asked Mr. Arrow for the meeting. Mr. Arrow made an appointment, we went to see Mr. Arrow. I explained to Mr. Arrow the purpose of our visit.

"Mr. Arrow at that point said, if it is in any way going to embarrass Mr. Chiantia, we will forget the oral agreement that we have reached.

"I said that that would not be necessary, that that was not the purpose of the meeting. The purpose of the meeting was for him to express to Mr. Adams his opinion as to the possibility of making a deal with ASCAP and to express to Mr. Adams his feeling for the deal, which he did.

"Q Why did Mr. Arrow, if you know, suppose that it

might be a source of embarrassment to you?

"A I don't know. I think you should ask Mr. Arrow that. I think Mr. Arrow was being very friendly. Mr. Arrow is a very good friend of mine and I had just joined MCA and Mr. Arrow was very happy about that and foresaw a brilliant future for me, and he didn't want to do anything to embarrass me.

"That is a natural concern of one friend to another which I appreciate very much.

"Q Did you discuss the oral understanding you had reached with Mr. Arrow with any other publishers or their representatives?

"A Yes.

"Q With whom did you have such discussions?

"A Mr. Leon Brettler, and many other publishers, Mr. George Joy, Eddy Joy, Richard Rosenthal, and there were others.

"Q With what company was Mr. Rosenthal?

"A Mills; and many others.

"Q Can you remember any others?

"A There were others, many others. I don't remember the extent of my conversations with all of them but there were others.

"Q Did you ever discuss the 3M program with Mr. Ricketts?

"A No, I don't remember that.

"Q Did you discuss it with anyone from Chappell & Company?

"A I really don't remember.

"Q Did you discuss it with Mr. Wattenberg, Philip Wattenberg?

"A Yes.

"Q Is he counsel for Chappell?

"A At that time, yes.

"Q What was the nature and substance of your conversations with Mr. Wattenberg?

"A I told him I thought it was something I should get involved in and I was going to get involved.

"Q What did Mr. Wattenberg say to you?

"A He said it was very interesting and attractive, and he had the same feeling I had about what was going to happen at the end of the three-year period.

"Q Which was?

"A Effectively policing and collecting the performing fees which would have been due at that time.

"Q I didn't understand the beginning of that answer.

"A His concern was that at the end of the initial period, the responsibility for the licensing and collection of performing fees would devolve upon us and he wondered whether we would be equipped to do it properly, which was the concern of everyone.

"Q Did he indicate to you how he had resolved that question in his own mind?

"A I don't know that he resolved it.

"Q Did he say anything else?

"A Not that I recall.

"Q Did he say to you that it was a mistake for Leeds to enter into the arrangement, in substance?

"A No, I don't think so.

"Q Did any publisher, any representative of any publisher with whom you spoke indicate to you that he thought it a mistake to enter into this arrangement with 3M?

"A There were obviously publishers who thought it was a mistake, and obviously some of them must have expressed it to me.

"Q We deal in the obvious. Can you remember any publisher who expressed that way?

"A Jack Bregman.

"Q With which company is he?

"A Bregman Vocco & Conn.

"Q What did Mr. Bregman say?

"A Mr. Bregman got very emotional about it and said it was a mistake, gave no reason reasons.

"Q Can you elaborate on what it is he did say?

"A He just said it was a mistake.

"Q A mistake in what respect?

"A A mistake to leave ASCAP and license on our own.

"Q Did he say why it was a mistake?

"A He gave me no good reason. If he gave me a good reason, I might have followed him.

"Q Did he give you any bad reasons?

"A Obviously he gave me bad reasons because I made the deal.

"Q What were the bad reasons he gave?

"A I don't remember. As I told you, I don't remember what his reasons were, good or bad, they didn't affect my judgment one way or the other.

"Q The question is, you recall he didn't give you any good reasons. Can you recall any of the reasons he gave you?

"A It was a mis-ake to license individually, that we would have trouble in effectively doing so, and where was it going to stop, if you license this individually, you have to license everything else individually. That roughly was the argument, and I don't buy that argument."

Page 153, line 16:

"Q Did Mr. Brettler ever say to you in your conversations with him about 3M that he had been in communication

with other publishers about 3M, in substance?

"A He certainly would have spoken to other publishers but I don't remember specifically, no.

"Q Did he ever say to you that he was chastised, critized by other publishers because of his willingness to enter into an agreement with 3M?

"A I don't think chastised is a proper term.

"As I indicated earlier some publishers thought we were making a mistake; Jack Bregman was one. I think that is about the extent of it.

"Q You had an experience with Mr. Bregman which you described in which Mr. Bregman you said was somewhat emotional about the subject.

"In comparing notes as it were with Mr. Brettler did he indicate to you he had similar experiences with other publishers?

"A But hardly chastisement. Mr. Bregman was not only oneof my strongest champions as president of the National Music Publishers Association but also elected me to the board of ASCAP.

"I hardly think that would have happened if Mr. Brettler was chastising me."

Thank you. I think that does it.

I'm sorry, your Honor, but there is a bit more.

Page 155, line 22:

"Q Let me show you a letter dated November 15, 1965, from the American Guild of Authors and Composers to publishers signed by Burton Lane, previously marked as Plaintiff's Exhibit 27 for identification, and I ask you whether you have ever seen it before."

THE COURT: That is an exhibit here now?

MR. TOPKIS: That is the Lane letter to Brettler.

I will continue to read:

"A Yes, but that would have been a communication from AGAC to publishers and not from me to AGAC.

"Q I meant to include communications either way.

"A Okay.

"Q Did you receive that letter at or about that time?

"A Yes. I recall having received that.

"Q Did you reply to it?

"A No, I did not.

"Q Did you discuss it with Mr. Brettler?

"A I may have, but I don't recall.

"Q Did you discuss it with Mr. Arrow?

"A I may have, but I don't recall.

"Q Did you discuss it with Mr. Levy or Mr. Adams?

"A No, I did not.

"Q Did you discuss it with Mr. Burton Lane?

"A No, I did not.

"Q What was your reaction to this letter?

"A I went into the program.

"Q You were already in it at that time?

"A Was I?

"Q Yes, this is dated November 15, 1965.

"A I did nothing about it.

"Q Is it your view that the opinions expressed in this letter were sound?

"A No, I felt quite honestly my authors and composers would have the confidence in my ability and integrity to believe I made a deal exercising my best judgement which would be for the ultimate good of all concerned.

It may interest you to know I received no further communication from AGAC.

"Q Mr. Lane's letter says, 'You will note that the AGAC contract, both the 1947 form and the 1939 form, calls for your obtaining the writer's consent if you wish to enter into a bulk or block license except under circumstances specified in the contract or to grant any license of a nature not granted prior to June 1, 1937.'

And he proceeds to call the reader's attention to Paragraph 4-J of the 1947 contract and 4-K of the 1947 contra

Did you obtain the writer consent as to 3M as to those writers who had signed the AGAC form contract with you?

"A No, I did not.

"Q Was that because you thought that Mr. Lane's interpretation of the contract was erroneous?

"A May I have your previous question to which this question referred? I am a little confused.

Can you read it back to me?

"Q Let me restate the matter.

As I understand this letter, Mr. Lane tells the publishers that under the AGAC form songwriter's contract, in particular Paragraphs 4-J and 4-K, a bulk license and a license for a use not known in 1937 required the writer's cons

I also understand Mr. Lane to say that the 3M license was both a bulk license and a license for uses not known in 1937, and hence that any publisher seeking to enter into an agreement with 3M should obtain his writer's consent if they were parties to an AGAC form contract with the publishe

Now, do you think his analysis of the situation was correct?

"A At that time?

"Q Yes.

"A I don't recall exactly what my reactions were at the time. Suffice it to say at the moment, you mention a block license and my own impression now is thinking back is I probably didn't agree with Mr. Burton that this was a block license.

As I explained to you yesterday my conception of a block license is a license in which a publisher winds up with

more money in the aggregate thatn the writers do in the aggregate.

I didn't think this was this type of contract.

"Q That isn't what the AGAC form contract says about block license.

"A But my impression was at the time that that clause was put into the contract, as I indicated to you yesterday, the practice which they are seeking to expel from the music businesses was one I mentioned to you yesterday, and which I recalled to you again today.

"Q What about the post-1937 uses?

"A Again, I think I was licensing a use which I had the right to license. It was a mechanical use which I licensed before, and it was a performing rights license which I granted before.

Not in this particular context but I had granted these licenses before.

"Q In what context had you granted performing rights licenses?

"A Motion picture performances.

"Q Did you discuss the question of the applicability of the bulk license provision and the post-1937 uses provision of the AGAC contract to the 3M si , the applicability or n with anyone?

A I don't recall.

"Q Did you seek legal advice?

"A I did not.

"Q Did you discuss the matter with Mr. Brettler?

"A I may have.

"Q Do you recall whether he expressed a view?

"A I don't recall.

"Q Did any of your writers complain to you --

"A No.

"Q -- at any time about the 3M arrangement?

"A Not that I recall.

Your Honor, I think that concludes our reading.

THE COURT: Is there anything further?

MR. HRUSKA: Not from the Chiantia deposition.

THE COURT: At this time we will take our afternoon recess.

(Recess.)

MR. TOPKIS: Your Honor, by inadvertence I skipped one line in my notes. May I read a bit more?

THE COURT: Yes.

MR. TOPKIS: Page 92, line 23:

"Q I call your attention to Paragraph (j).

"A Without reading it, I know generally about block licenses.

"Q What is a block license?

"A A block license is a license in which a publisher will give to a user unrestricted use of the compositions in his catalog in in return for a sum of money.

"Q Do you know the purpose sought to be served by this clause?

"A Yes; I do.

"Q What is that?

"A Again, I go back a very long period of time, but at one time the music publishers were giving contracts to manufacturers and printers of song lyrics magazines. A Song lyric magazine is one in which the lyrics of the popular songs of the day are reproduced with the permission of the copyright owner.

"Q Without the music?

"A Without the music. At one time, this was a very lucrative business, and publishers were in fact getting large amounts of money as advances from the manufacturers of song lyrics magazines.

The publisher, of course, would have only the obligation to pay its author and composer under the terms of the contract which then existed, and in many of those contracts there was a figure mentioned, $25 for each use or $12.50, whatever the case may be.

"So you can understand, therefore, that a publisher could have kept a considerable amount of that advance for himself by merely paying the writer what was provided for in the agreement, because there was no relationship between the number of uses and the amount of money paid.

ASCAP was seeking -- excuse me -- AGAC was seeking to get around that by restricting block licensing.

Now, this is what I remember."

That does it, your Honor.

MR. HRUSKA: Your Honor, it had been my intention to read a page and a half of another deposition, the deposition of Sid Herman, but I have just been handed a designation of some 65 pages which ASCAP proposes to read.

I understand that Mr. Arrow is in court. Rather than delay his appearance with the reading of 65 pages in response to a page and a half, I would propose that we call him.

A L L E N H. A R R O W, called as a witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BAKER:

Q Mr. Arrow, would you briefly detail your formal education.

A Yes.

I went to public school in Brooklyn. I think it was 208. I went to Tilden High School. I went to Brooklyn College, and I went to New York University Law School.

Q You are a member of the Bar?

A Yes.

Q What is your present position?

A I am a shareholder in a professional corporation called Ornstein, Arrow, Silverman & Parker, P.C.

Q For approximately how long have you been with that firm?

A Well, the firm became a professional corporation January 1. Prior to that, I was a partner in the predecessor since 1959 or 60.

Q Would you briefly describe the extent of your experience in the area of negotiating licensing agreements for the use of music or other contracts relating to interests in copyrighted musical compositions?

A Well, the practice of our firm is largely in the entertainment and communications industry. I suppose that somewhere between 50 and 70 percent of the legal work I do is involved in those industries.

Q Does your firm from time to time represent the Minnesota Mining and Manufacturing Corporation? When I

when as your firm I refer to it in its present status and prior status.

A Yes.

Q Was your deposition previously taken in this action?

A Yes.

Q You testified at that time on behalf of 3M?

A Yes.

Q Also inconnection with that deposition you produced certain documents from your files and 3M's files?

A Yes.

Q During the period 1963 or 1964, was your firm retained by 3M in connection with the M-700 project?

A Yes.

Q Would you provide for the record a description of that project?

A Well, I think we were actually retained in connection with 3M's project in the music industry and recorded tape industry. The M-700 project was one of the projects 3M had. What it was, it was a machine, the M-700 was a machine which reproduced a prerecorded tape and it was designed for use in the background music industry.

It was 3M's intention to sell these machines and cartridges or tapes for use commercially.

Q Would you briefly describe the type of establishment which the M-700 project was designed for?

A It was designed for commercial establishments -- largely restaurants, stores, small factories, doctors' and dentists' offices and similar establishments.

Q Did the type of establishment to which 3M expected to market the M-700 machine as a general proposition differ from the type of establishments which at that time accounted for the bulk of revenues from background music services?

A I don't think I can answer that question. I don't know accurately what the facts are which would be responsive to such a part of your question.

Q Did 3M regard the M-700 machine as more suitable for large, multiple tenancy establishments or for smaller establishments, such as doctors' offices, dentists' offices and relatively small restaurants?

A It was regarded by 3M as being suitable for smaller establishments.

The type of installation which would require on 3, 4 or 5 speakers, rather than a substantial kind of installation, such as shopping centers or --

THE COURT: Big factories?

THE WITNESS: Department store or something like that.

Yes, sir.

Q Were these generally the types of establishments that the 3M distributor solicited in an attempt to sell this machine?

THE COURT: You mean the smaller ones?

Q The smaller ones.

A Yes.

Q Do you recall approximately how many of the machines were sold?

A You mean to this date?

Q Yes.

THE WITNESS: Your Honor, CBS is in the background music industry. They are competitors of 3M and I think it would be in the best interests of our client if we would not answer that question.

THE COURT: Well, I have no personal desire to make you answer the question. I would not, under the circumstances, make you answer the question unless CBS indicated to me it was a critical matter, in which event I might consider it.

Can you use an adjective or something to give us an idea?

Are you just trying to show it is a large number or a small number?

MR. BAKER: It is a large number, and Mr. Arrow did previously testify to this in his deposition, sir.

THE COURT: Well, I assume -- of course, you don't speak for 3M itself here, but you did apparently give a figure on the deposition. Is there any reason why you can't give that figure now, or is it just that since then you've realized that you said it and you wish you hadn't?

THE WITNESS: It's that I realized.

First of all, I think the figure I gave in the deposition was inadvertently inaccurate. And, secondly, in a conversation with 3M's executives I have been advised that they would prefer that the exact number not be disclosed.

I think I can say that 3M probably has more installations in the United States than any competitor.

Q Do you know how many installations the next largest competitor has?

A No.

MR. HRUSKA: Your Honor, I might say, on the CBS involvement in background music, it is possible Mr. Arrow knows more about this than I do or Mr. Appel, the deputy general counsel of CBS, who is sitting here, but my understanding is that CBS is involved only in connection with providing music services for airports.

THE COURT: I don't think we need that.

MR. APPEL: I confess ignorance, and it is my understanding, fragmentary as it is, that the airport matter is not current. But I don't say I know all the facts.

THE COURT: I don't want to force an answer in the first place. In the second place, I can't determine

just what other exposure to competitive forces the announcement of that figure might cause. It seems to me that CBS ought to be protected by my understanding, unless it is contested, that this was a fairly large, successful operation.

MR. BAKER: Yes, sir. I would like to try just one more form of the question.

BY MR. BAKER:

Q And what I ask you is this: Do you recall how many were sold during the first three years? Would that raise the same problem? And if you don't know, I would ask you to check and find out for us.

A I think an approximate number of sales in the first three years would be 20,000.

THE COURT: Twenty?

THE WITNESS: Twenty thousand.

MR. TOPKIS: Could we know what the first three years that Mr. Arrow is referring to were?

THE WITNESS: The first three years that the program was active in the market.

MR. TOPKIS: Starting late '64?

THE WITNESS: I don't recall whether it was '64 or '65.

MR. BAKER: I think we'll get to that.

MR. TOPKIS: Fine.

Q You stated that the machine utilized a tape cartridge to reproduce background music. This tape cartridge was sold with the machine?

A Yes.

Q At a single package price, the machine and the cartridge?

A Yes.

Q And did the tape cartridge include performance rights? I'm sorry. Did the price of the machine and the tape cartridge include performance rights?

A Yes.

Q Was the cartridge manufactured by 3M?

A Yes.

Q And the compositions on that cartridge were selected by 3M?

A Yes.

Q And did 3M arrange for the arranging of the compositions to make them suitable for background music usage?

A In some instances yes; in some instances they purchased the rights to duplicate tapes which were already in existence.

Q And the cartridge, I think as we all know now, had 700 compositions on it, is that correct?

A The basic cartridges had 700 compositions.

THE COURT: How long did it play? A week?

THE WITNESS: Twenty four hours.

THE COURT: Is that all?

THE WITNESS: Yes.

Q Now, during the period, say the first three years, that the program was being marketed, do you recall approximately how many different cartridges were made?

A Would you repeat the first part of the question, please?

Q During the first three years in which the M700 machine was marketed, do you recall approximately how many cartridges were made?

A You mean difference in program?

Q Yes, different in the titles and the sequence of the musical compositions which appeared on them or in the arrangements of the musical compositions that appeared on them.

A I would estimate during the first three years there were between eight and ten different cartridges.

THE COURT: Let me ask you about thedifference. Was all the music on one tape different from all the music on another or did they use some of the same songs on one tape but others as well? Do you follow me?

A There were some transpositions, and there were certainly some duplications of titles with different recordings possibly, and in some cases the same actual recording was used on more than one cartridge.

THE COURT: Thank you.

BY MR. BAKER:

Q In addition to a performance rights license for this cartridge, you also needed a mechanical license, is that correct?

A Yes.

Q And would you just briefly describe for the record what a mechanical rights license is in this context?

A It is the right to manufacture parts reproducing the musical compositions in the form in which they can subsequently be played audibly.

Q Did 3M seek to obtain performance rights licenses on their own behalf or on behalf of the purchasers of the equipment?

A Well, the actual performers of the music would be the purchasers of the equipment and the cartridges, and it was 3M's desire to see that they were protected and that they had licenses.

Q So the answer to my question is that 3M sought to obtain licenses for the benefit of the people who purchased

the equipment?

A That's correct.

Q Now with respect to the mechanical rights license, was that obtained frofor 3M's benefit or for the benefit of the people to whom the machine was sold?

A For 3M's benefit.

Q Did 3M ever consider simply letting the customers obtain the necessaryperformance rights licenses?

A If it was considered, it would have been considered very briefly, and the idea would have been discarded as impractical.

Q Can you tell me why it would have been impractical?

THE COURT: You don't have to take very long if you are trying to make me understand.

THE WITNESS: I beg your pardon?

THE COURT: I say you don't have to take very long if you are trying to make my understand. It seems fairly obvious. But maybe you want to get it in the record.

A It would have been more expensive for the purchaser and 3M probably would have been bombarded by complaints from its purchasers as well as from the performing rights societies.

Q Whom did you first approach in your attempt to

secure performance rights licenses?

A Performing rights societies.

Q Do you recall approximately when that was?

A No, I don't recall. I know it is in my deposition, I know it is in my diary, but I would think it would be 1963 or '64.

MR. BAKER: Your Honor, pursuant to a subpoena served on Mr. Arrow I asked him to bring his diaries from that period. I do not propose to offer them in evidence, but I would like him to look at those diaries to refresh his recollection.

THE COURT: All right. No problem.

That's what you get for keeping diaries that far back.

THE WITNESS: It is a requirement that is strictly observed by Internal Revenue these days.

MR. BAKER: I suggest the witness look at February 5, 1964.

A Yes. I believe on February 5, 1964, there was a meeting at ASCAP to discuss the 3M problem.

Q And this was the first meeting with representatives of performing rights societies which you can recall at this time?

A I think so, yes.

Q Prior to that meeting, did you give any consideration to approaching publishers directly for these types of licenses?

A No.

Q The only entity you thought of approaching was ASCAP and BMI and possibly SESAC?

A Yes.

THE COURT: When you talk of the negotiations, you were present, of course?

THE WITNESS: That was a meeting at which I was present.

Q Do you recall how the meeting was arranged?

A No. I suppose it was arranged by telephone. I don't know who specifically.

Q Do you recall who was present at the meeting?

A My diary indicates that Herman Finkelstein was present, and for the 3M side there would have been either Mr. Lindgren or Mr. Selvin.

Q And could you identify Mr. Lindgren, please?

A Mr. Lindgren was the background music project manager for 3M at that time.

Q He was in charge of the business aspects of it, generally speaking, as the chief operating officer, or whatever one would call him?

A He was in charge of all aspects.

Q Do you recall whether Mr. Jules Collins was there?

A He was present at some meetings. I don't recall specifically that he was present at that one.

THE COURT: Who is he?

THE WITNESS: My understanding, sir, is that he was the man in charge of non-radio licensing for ASCAP.

Q And who was Mr. Selvin?

A Mr. Selvin was the music consultant for 3M.

Q Do you recall any of the discussions which occurred at that meeting, what did you say to them, what did they say to you or what the purpose of the meeting was?

A The first meeting we had was to discuss generally what 3M intended to do in the background music industry and to find out from ASCAP what rates and terms would apply.

I think at that time we disclosed to ASCAP that we had intended to market this machine by selling it rather than leasing it, and we probably discussed the problems which were inherent in that departure.

Q Do you recall what those problems that were discussed were?

A I don't recall whether they were discussed at the first meeting or not. But as the meetings progressed, the problems became those of policing after the initial license

term expired, the problem of establishing a flat rate which would cover all installations instead of a variety of rates, problems of having a single term of license apply to all purchasers rather than terms which would end at the same time but cover differing period --

Q Hold on that last one. You mean the problem of having a license commence when the machine was sold for a period of three years and then terminate three years after the date of sale?

A That's correct.

Q Rather than having discrete licensing periods for all the machines, regardless of when they were sold?

A Well, perhaps I can state the problem more clearly. If BMI had taken a fixed rate license from a performing rights society beginning, say, January 1st, 1966 and terminating December 31st, 1968, if a machine was sold during that period the license would expire on December 31st, 1968 regardless of teh time it began.

So that each purchaser could conceivably have a different period of license term, or different term of license, and that would be totally unworkable from the point of view of the salesman as well as from the point of view of the purchaser. The rates would all be different and you could conceivably get to the absurd position of selling

a man a machine ten days before the license expired and telling him he had ten days in which to use it.

THE COURT: He wouldn't be very likely to buy it, then.

THE WITNESS: No.

I think those were the major problems. There may have been some others.

THE COURT: Did these problems arise, as a matter of curiosity, as a result of the varying expiration dates of the copyrights on the 700 songs?

THE WITNESS: Yes, sir. That was another problem. Thank you for bringing it out.

Under the terms of the license which was proposed by ASCAP, ASCAP would have the right to delete particular compositions from its repertoire at various times. If that were to happen, 3M would be in the position of having sold the tape with no way to reclaim it even though there might not be a performing rights license attaching to the compsotion whichwas deleted.

We couldn't afford to take that risk on behalf of either the purchasers or the company.

Q You have discussed these problems but you haven't told us who was on which side of which problem. On the variations of licensing datas, in other words I take it 3M

sought to obtain a license which would take effect on the sales of machines to run for a period of three years.

A Well, that was 3M's intention, to have a three year license attach to thesale of each machine.

Q Yes. And you say it was a problem. I take it that ASCAP found some problem with this proposal.

A Yes, it did.

Q And do you recall why it created a problem for them?

A Well, because from ASCAP's point of view, if they had established the rate or contract period with 3M which was, say, three years in duration, if 3M had sold a machine, let's assume, in the last month of that contract period with a three year license attaching, ASCAP would have been establishing a rate to take effect over a period of almost six years, and ASCAP at that time was unwilling or unable to do it.

Q Let's try and put this back in some sort of time frame. After your February 5, 1964 meeting, do you recall when the next meeting was?

THE COURT: Mr. Baker, I am afraid that I am going to have to terminate. I assume anyway this is just as good a time as any.

So we are adjourned, then, until ten o'clock

Monday morning.

MR. BAKER: May I put on the record that I am giving the witness his $22 witness fee.

THE COURT: All right. I hope that some of you lawyers will be able to get out of your offices over the weekend.

MR. TOPKIS: Thank you, your Honor.

(An adjournment was taken to Monday, May 13, 1973 at 10 o'clock a.m.)

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JACK GREENBERG
MURRAY PADGUG
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM	Before: HON. MORRIS E. LASKER, District Judge
vs.	
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.	69 CIVIL 5710

New York, May 14, 1973

STENOGRAPHER'S MINUTES

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURTHOUSE

Columbia Broadcasting System

vs. 69 Civ. 5740

American Society of Composers, Authors and Publishers et al

New York, New York,
May 14, 1973 - 10:05 A.M.

(Trial resumed.)

MR. HRUSKA: Your Honor, before we resume the direct examination of Mr. Arrow, I would like to state that Mr. David Blasband, who is the counsel for AGAC, is here and he has brought with him two documents which we discussed during the testimony of Mr. Lane and have subpoenaed.

Mr. Blasband has a position of privilege with respect to the documents.

Now, I think the whole matter concerning those documents really should await the testimony of Mr. Kellman, which probably will occur tomorrow but since Mr. Blasband is here, he would like to state a position which could kind of be left on the record for your Honor to deal with tomorrow after the examination of Kellman.

THE COURT: Will you remain me what the documents

are? Or Mr. Blasband can tell me.

MR. BLASBAND: Your Honor, I present to the Court two documents to which have been appended paper clipped notations Numbers 6 and 7. These notations were put in these documents by attorneys for CBS during the course of a rather extensive discovery proceeding which they had of the files of AGAC.

We had, pursuant to stipulation, allowed the CBS attorneys to go to our files, pick out the documents that they considered pertinent to their subpoena and those documents were presented to me for review before the actual attorneys saw them -- the attorneys for CBS, that is.

I then disclosed the documents that I deemed pertinent and we worked that out, I think, in a fairly amicable fashion.

Today, I have these two documents which are described as drafts of letters, a draft of a letter dated November 15, 1965, from Burton Lane of AGAC, addressed to "Dear Publisher."

These is no question that these are the documents that are subpoenaed, your Honor, because CBS has advised me that these are the numbered documents which they want.

Both of the documents, I believe, your Honor --

THE COURT: Am I correct in understanding these would be earlier drafts of the letter that ultimately went to the publishers?

MR. BLASBAND: That's correct, your Honor.

Both of these documents, I believe, your Honor, have been described by Mr. Lane in his pretrial testimony as documents which were prepared by counsel, Mr. Leon Kellman, who I understand will be testifying tomorrow.

There are notations on these documents. Obviously, some material has been excised from the document which became the letter that actually was sent out.

I submit that that type of work product of the attorney renders these documents privileged.

I understand Mr. Kellman will testify tomorrow and I suspect that he will be asked by the attorneys for CBS as to whether he actually did do work on the documents. If he did not, if Mr. Lane's memory was incorrect, then obviously I will withdraw the privilege that I am assering here and if I may, your Honor, I would like to leave the documents with the Court and I would also appreciate it if as a question of law the CBS attorneys have a position, that we could argue it now and that would obviate the need for me to come back.

THE COURT: Not only CBS, but any other party.

MR. HRUSKA: I think we would take the position, your Honor, that these drafts are not privileged, even if Mr. Kellman did work on them.

Mr. blasbandreferred to just now the work product privilege and on that we think Mr. Lane's testimony, if I remember it correctly, that AGAC did not actually contemplate suing, bringing a lawsuit against the publishers who dealt with 3M, if it is true that they gave no thought or, as Mr. Lane certainly put in the deposition, that they never gave litigation a thought that, I think, would obviate the work produce privilege.

THE COURT: You think the work product privilege would apply only if litigation was contemplated and not if Mr. Kellman's work was in the ordinary course of his duties as counsel to AGAC?

MR. HRUSKA: Well, I think the work product privilege itself is hinged to some anticipation of litigation.

As far as any other privileges go --

T HE COURT: What if Mr. Kellman anticipated it and Mr. Lane didn't know that he did.

MR. HRUSKA: Well, I think it is a question of whether or not between the attorney and the client there was some understanding that the attorney was working with

litigation in mind.

I don't believe that the document is otherwise privileged. These were drafts of letters that were intended to be circulated to all publishers who had AGAC contracts with writers and with that sort of dissemination in mind, the drafts, I don't believe, were the sort of matter to which a privilege would attach.

I haven't seen the documents, but there may be notations in the margin, comments by Mr. Kellman, that conceivably might be privileged, I don't know. But those could be masked or excised.

THE COURT: Is there anything besides the typewritten material?

MR. BLASBAND: No. There are penciled notations, your Honor.

THE COURT: So far as you know, entered by Mr. Kellman?

MR. BLASBAND: I think so but I believe Mr. Kellman would be the best one to determine it.

MR. HRUSKA: It really is very difficult and I think impossible to conduct a real argument at this stage as to the privileged nature of the documents until we get Mr. Kellman on the stand.

THE COURT: Certainly it is impossible to

make a final ruling. But I don't think it hurts to spend a couple of minutes exploring it.

Is that all you have?

MR. HRUSKA: I believe so.

MR. BLASBAND: Just so I am not misunderstood, I am not just claiming work product as a privilege. I am claiming the general attorney client privilege and I think that once your Honor sees the documents, you will see that, in essence, this is advise to client.

THE COURT: Well, that is why I asked whether Mr. Hruska considered the work product -- it is true that you put your emphasis on it to beginwith and I am glad you clarified it.

MR. HRUSKA: I am reminded there is an additional point that we probably would make here. The work product, if we are talking about that doctrine, is of course a conditional doctrine and it may well be that these documents constitute an incite into the actual state of mind of AGAC and the AGAC counsel, which is the only insight that might be afforded them, a full glimpse into the real basis and quite possibly the work product privilege might be overcome. This might be a showing of good cause, which would justify the production of the documents.

THE COURT: Thank you.

Mr. Topkis?

MR. TOPKIS: I have nothing to add, your Honor.

THE COURT: Miss Kearse?

MISS KEARSE: No, your Honor.

THE COURT: Thank you. If you will leave them.

MR. BLASBAND: May I leave them with the Court and this again raises the question as to whether my presence would be needed tomorrow. I would be quite happy to leave the documents here. I think I have said all I want to say on the legal question and if there are any other questions I am sure ASCAP and BMI can come in as amicus and state their positions as amicus, if that would be correct, your Honor.

THE COURT: Let's leave it this way: You needn't appear tomorrow unless I find after testimony there are certain questions I would like to ask you, in which case I will get in touch with you.

MR. BLASBAND: Thank you.

MR. HRUSKA: May I inquire as to whether or not the documents have been shown to anybody outside of AGAC or your own office or Mr. Kellman?

MR. BLASBAND: Not by me or anyone that I know of. I have not shown them to ASCAP counsel or to anyone.

THE COURT: Thank you.

MR. TOPKIS: Your Honor, before we proceed, might I just note that at an appropriate time we would like to be heard on the adequacy of the targets that are set up for us by the latest statement by CBS of the elements of a per use license.

MR. HRUSKA: I didn't hear you.

MR. TOPKIS: The targets that are set up for us, some time out of witness time.

THE COURT: All right.

Are you ready to proceed now?

Mr. Arrow, will you come up, please.

. . .

A L L E N A R R O W, resumed:

DIRECT EXAMINATION (continued)

BY MR. BAKER:

Q Mr. Arrow, last Thursday we discussed a meeting of February 5, 1964.

Do you recall when your next meeting with ASCAP was concerning the licensing of performance rights for the M-700?

A No, I don't.

Q Could you refresh your recollection by looking into your diary?

A Yes.

THE COURT: Do you have any suggestion that could refresh his recollection?

Q July 6, 1964?

A Did you say July 6?

Q Yes, that's what my notes say.

A I don't have any notation in my diary that there was a meeting on July 6th.

THE COURT: Is the date significant? Can we go ahead and hear the testimony and you can work out with Mr. Arrow what the date was?

MR. BAKER: Yes.

Q Do you recall who attended that meeting?

A No, sir, I don't recall the meeting at all at this time.

Q Let me show you a document which I do not propose to offer into evidence but which may refresh your recollection.

THE COURT: Do you want to state for the record what that is?

MR. BAKER: The exhibit is 3MPX3.

A I think I should indicate that the reason that this document does not refresh my recollection is that I was not at that meeting. It is a letter signed by -- this is a letter signed by Harold Ohrenstein, my partner

concerning the meeting.

THE COURT: If you were not there, there is no need for you to explain what the document says.

So it does not refresh your recollection?

A It does not.

MR. BAKER: I would like to make one more attempt at refreshing the witness' recollection and show him the testimony previously given in this action, pages 130 and 131.

THE COURT: By himself?

MR. BAKER: By himself, yes, sir. Going to line 21.

MR. TOPKIS: What page?

MR. BAKER: 130 and 131.

A Yes, I see what you are referring to.

Mr. Baker, the testimony in this deposition refers to some notes, and not to this letter. This letter which you have handed me does not refer to my appearance at the meeting.

Q No, I just thought that the letter does describe the meeting and I thought it might help you recall what happened or whether you were there.

A I don't specifically recall being at that meeting nor would I recall being at any other meeting by date at this

time.

THE COURT: If the dates are significant, Mr. Baker, I would ask you to have Mr. Arrow check his material during the lunch hour if he is still around or we can take a short break at the end of his testimony if it occurs before that.

Can we get to the substance of it?

MR. BAKER: Right, your Honor.

The reason the date is important, your Honor, is because there is a particular proposal that was put on the table at that time and I think maybe I now have the notes that Mr. Arrow referred to in his deposition.

Q Can you identify this document?

THE COURT: What is it, for identification?

MR. BAKER: 3MPX2.

A Yes.

Q And by whom was that document prepared?

A By Mr. Lindgren or people in his employ.

THE COURT: Who is Mr. Lindgren?

THE WITNESS: He was the project manager of the 3M background music division or group.

Q Do you know for what purpose that document was prepared?

A I believe it was prepared for the purpose of

submission to ASCAP.

Q Do you know whether it was in fact submitted to ASCAP?

A I don't recall specifically that it was submitted.

Q Do you recall whether it was used as a-- whether it was discussed at a meeting with ASCAP?

A I believe it was.

THE COURT: By that, you mean the document itself or the points that it contains?

THE WITNESS: The points in the document.

Q Does the date on the document suggest to you any general time frame in which that meeting may have taken place?

A The date on the document is July 6, 1964, and I would presume that it was prepared for submission at the July 6th meeting.

Q Do you recall at this point whether you were at the meeting where that document was discussed?

A I was at a meeting where the points in this document were discussed. I don't recall whether it was July 6th or not.

Q Could you just relate to us the substance of that discussion?

A Mr. Lindgren made a proposal to ASCAP with respect

to 3M's plan to sell this new 3M unit rather than to lease it; and it was Mr. Lindgren's proposal that 3M pay ASCAP or deal with ASCAP on a slightly different basis from that which was in our frame of reference customary within the background music industry.

Q Directing your attention to the third paragraph on page 1 of this document, do you recall whether the sales of the M700 machine would replace to any existing degree, to any existing locations being serviced by leased music operations?

A I believe Mr. Lindgren must have said that a number of times in the various discussions with ASCAP and other societies.

It had also been his point of view that the sale of machines would not replace very many leased installations but would supplement them.

Q Do you recall who the marketers of leased installations were at that time or some of them?

A Well, there was Muzak and I believe Seeburg and one or two others.

Q Do you recall whether there were any marketers of background music services which sold the equipment at that time?

A To the best of our knowledge, there were no major

markers who sold machines and tapes.

Q Directing your attention to the third paragraph from the bottom on page 1 of 3MPX2, do you recall whether it was discussed at that meeting that 3M sought performing rights licenses only on behalf of a certain classification of potential customers of the M700?

A Yes, I do recall at one time that was 3M's position.

Q Do you recall what that classification of customers was?

A My recollection is that at one time Mr. Lindgren and I attempted to secure a license from ASCAP covering only doctors and dentists' offices and similar professional locations, and small factories and possibly small stores.

Q Did 3M plan to limit its sales to those types of establishments?

A In the initial stages, yes.

THE COURT: I am not quite sure what you mean by "the initial stages."

Do you mean that in its early discussions 3M only talked about that or how do you mean that 3M planned that in the early execution of its arrangements it would only try to introduce this music into those offices?

THE WITNESS: At the time this proposal was

discussed it was 3M's plan to approach, to sell only the doctors and dentists, small stores and other professionals.

Q Do you recall the amount which 3M was offering ASCAP at that time?

A No, I don't.

Q For performing rights licenses?

A No, I don't.

Q Would you look at the last three paragraphs on page 3 of 3MPX2 and see if that refreshes your recollection?

A The memorandum indicates specifically what the proposal would have been.

I don't recall it exactly in those terms but it seems to me that was approximately what was discussed.

MR. BAKER: I would like to offer the memorandum at this time into evidence.

MR. TOPKIS: I have no objection, your Honor. I don't know that it helps us much but--

MISS KEARSE: May I ask for what purpose this is --

MR. BAKER: Simply because it is a record which was used in the course of negotiations. I do not offer it for the purpose of demonstrating that any of the statements in that are true except to the extent that they reflect 3M's position in negotiating for the M700 cartridge

at approximately that point in time.

MISS KEARSE: May I ask if it is your contentionthat each statement in here was made by 3M at a meeting with ASCAP?

MR. BAKER: I think it would be impossible to determine that at this time so it is not my contention that each statement was made by 3M at that meeting; but I think it is the best record we have of what was discussed.

MISS KEARSE: Your Honor, I would suggest that only those portions which the witness is able to say were statements made at the meeting should be admitted.

THE COURT: I will admit the whole document for the purpose of showing that it was 3M's position because I understand, Mr. Arrow, that it does state what 3M's position was at that time; is that right?

THE WITNESS: Yes, sir.

THE COURT: I will admit such portions as Mr. Arrow has identified truly reflecting what was discussed in addition for that purpose.

MISS KEARSE: Well, our position is to the extent that the position was not expressed, it is not relevant.

THE COURT: I will accept it as limited.

(Exhibit 3MPX2 received in evidence.)

Q You have testified earlier that in addition to the tape which would be sold with the machine, 3M had planned to make available additional tapes to purchasers of the M700.

Do you recall whether in your meeting in or around July 6th of 1964, you discussed whether additional fees would be payable to ASCAP on the sale of such additional tapes?

A I don't believe it was discussed as early as July 6th.

Q Do you recall ASCAP's response to the proposal made at the meeting on or about July 6th, 1964?

MR. TOPKIS: I don't understand.

I thought the witness testified he was not at the meeting. Perhaps I misunderstood.

THE COURT: I am a little confused. I know that he said he does not find any reflection in his diary but then I understand that he does believe he was present at the meeting at which the points referred to in 3MPX2 were discussed and that memorandum is dated July 6th, and he believes that the meeting regarding it was about that time, so I take it that you are answering questions now about a meeting at which you were present?

THE WITNESS: Yes, sir, but it might not have been a meeting of July 6th, 196--

THE COURT: That is why I asked before whether the date is critical.

I take it it was some time about that, is that correct, Mr. Arrow?

THE WITNESS: Yes.

THE COURT: Now the questionwas whether you recall ASCAP's response to the proposal made by 3M?

A I don't believe ASCAP ever specifically responded to that proposal. At least they did not immediately after the meeting.

Q I mean at the meeting, for example?

A Oh, I think the response was that they would consider it.

Q Do you recall whether they expressed any view concerning the possibility that the type of license you sought might be discriminatory toward other ASCAP licensees?

A You meanat that meeting at which the proposal was discussed?

Q That is correct.

A I don't recall whether they gave that response at that meeting. At one time or another-- I think at several times during the course of our negotiations ASCAP took the position that any license granted to 3M by ASCAP could not discriminate against other background music

services.

THE COURT: Could not since they would not permit it?

THE WITNESS: That is correct.

Q One more question on 3MPX2.

I would like to direct your attention to the last four words of the third paragraph from the bottom.

Did you discuss with ASCAP representatives at the July 6th meeting or any subsequent time whether the kind of establishments to which 3M expected to sell the M700 cartridge required any performing rights license at all?

A Yes, we did discuss that.

Q And do you recall the substance of those discussions?

A I think at least one discussion we had, I believe it was Mr. Finkelstein, that there was at least some legal opinion that doctors and dentists' offices and other professional types of offices were not public locations which would fall within the rights of the copyright proprietors for performing fees; and I believe Mr. Finkelstein's response was that it had not yet been adjudicated but ASCAP was prepared to take the position that doctors and dentists were licensable establishments.

Q Do you recall approximately when the next

meeting with ASCAP may have taken place, which you attended?

A According to my diary --

THE COURT: After this early July meeting?

MR. BAKER: After this, yes, first or second week in July meeting.

A According to may diary it appears to be July 31.

Q Do you recall who attended that meeting?

A Mr. Lindgren, Mr. Herzog, and I.

THE COURT: Who is Mr. Herzog?

THE WITNESS: Mr. Herzog at that time was a corporate vice president of 3M who was in charge of a number of divisions, including the one that encompassed the background music project.

He is now the president of 3M.

Q Do you recall the substance of the discussions at that meeting?

THE COURT: Well, you asked hwo was there, and you told us only who was there for 3M.

I assume there were others?

Q There were people from ASCAP there?

A Yes, I am sure there were people from ASCAP there.

THE COURT: Do you remember anybody?

Q Do you recall who they were?

A Not specifically at this moment. I would -- I mean at all meetings either Mr. Korman or Mr. Finkelstein or both were present. At some Mr. Collins was present, and those were the persons with whom we dealt initially.

Q I would like to show you your prior testimony in this action at page 139, line 10, and see if that refreshes your recollection at all as to who was there.

MR. TOPKIS: Refresh his recollection as to what?

MR. BAKER: Who was there on behalf of ASCAP.

MR. TOPKIS: Thank you.

A My testimony indicates that Mr. Finkelstein and Mr. Collins were present. I see no reason to change that recollection.

THE COURT: Mr. Finkelstein and whom?

THE WITNESS: Mr.Collins.

THE COURT: Who is Mr. Collins?

THE WITNESS: I believe Mr. Collins's position at ASCAP was an officer or representative of ASCAP in charge of licensing non-radio installation.

MR. TOPKIS: I think we can state for the record, your Honor, he was sales manager of ASCAP.

THE COURT: Sales manager.

MR. TOPKIS: That was his title.

Q Do you recall the substance of the discussions which took place at that meeting?

A Not specifically.

Q Do you recall whether ASCAP responded to proposals made at the earlier meeting?

A I am srue that we discussed the proposals made at the earlier meetings; and-- or meeting, and as for a response, I am not sure whether ASCAP gave us one.

Q Did ASCAP express any form of dissatisfaction with any aspect of the proposal made at the earlier meeting or any 3M proposal made at this meeting?

A ASCAP consistently took the position that the type of license which ASCAP would have favored issuing was or a very similar to the one in effect with Muzak or [illegible]; and at a number of these meetings, I can't pinpoint the precise meetings without referring to other notes -- as a number of these meetings 3M discussed the fact that that type of license was not acceptable, not workable from 3M's point of view.

Q I would like to direct your attention to Page 140, beginning at Line 22 in your deposition pre viously given in this action.

Would you determine whether that refreshed your recollection in any way about the specic features of the 3M proposal which ASCAP objected to?

A Yes. But that conversation could have taken place at any one of a number of meetings.

What I am saying to you is that I do recall having this conversation more than once with ASCAP but not at that specific meeting.

Q Well, let me ask you this -- at this meeting or any meeting did ASCAP express dissatisfaction with the 3M proposal because the license requested appeared to be a license for specific compositions?

A Yes.

THE COURT: For specific compositions?

MR.BAKER: Yes.

THE WITNESS: Yes, your Honor.

Q You said that ASCAP had indicated either at this meeting or other meetings that it would favor the type of license which Seaburg and Muzak had obtained or were about to obtain.

Would you describe for us the basic differences

in the context of this discussion between those two types of licenses, the type 3M sought and the type ASCAP favored?

MR. TOPKIS: That SCAP what?

MR. BAKER: Favored.

MR. TOPKIS: Wouldn't the easy way to make that comparison be to lay the ASCAP licenses with Muzak and Seeburg alongside whatever proposal we made to Mr. Arrow.

THE COURT: It is to find out about what happened orally.

MR. BAKER: Except it wouldn't give us the difference in --

THE COURT: That is what we are talking about, right?

MR. BAKER: That's right.

THE COURT: Mr. Arrow?

THE WITNESS: 3M consistently wanted a license to use specific compositions for a period of time and 3M also wanted to attract customers and to make the salesman's life easier by having one rate, which would apply to every conceivable type of 3M installation.

ASCAP's position, as it was stated to us was that ASCAP was ready to grant a blanket license to use the entire ASCAP repertoire and that the rates which

applied to different establishments would have to apply.

The problem from 3M's point of view with the variant rates was that we didn't think it was practical for salesmen to be required to compute accurately or inaccurately for each potential purchaser different fees depending upon the type of installations which the salesman was approaching.

There were differences in rates according to the size of installation and the type of installation and we thought it was unworkable from 3M's marketing standpoint.

Q Do you recall what the status of the 3M-ASCAP negotiations was at the end of the meeting on July 31,1964?

A I don't think there was any conclusion drawn by either party at that early date.

Q Do you recall whether ASCAP at that meeting offered to submit its own proposal?

A ASCAP offered to submit its own proposal at some time around that date, I don't recall specifically whether it was July 31.

Q I would like to show you 3M PX4 and ask you whether this letter is ASCAP's proposal, or a portion of it.

A I am sorry. I don't recall the question.

Q The question is whether the letter signed by

Mr. Collins and addressed to you, dated August 18, 1964, and labeled 3M PX4 is the proposal which ASCAP was to make.

A It is the proposal which Mr. Collins made on behalf of ASCAP.

MR. BAKER: I would like to offer it into evidence at this time.

MR. TOPKIS: No objection.

MISS KEARSE: No objection.

xxx (3M PX4 was received into evidence.)

Q Now, do you recall whether you discussed this proposal with representatives of 3M in or about that time?

A Yes, we did discuss it.

Q Do you recall what the substance of those discussions were?

MR. TOPKIS: Just a second, if I may.

Discussions between Mr. Arrow and representatives of 3M, I would think, is irrelevant and not binding upon us.

THE COURT: Is that what you asked?

MR. BAKER: Yes, but I asked it only for the purpose of showing the state of mind of 3M at that time.

THE COURT: I don't know that it is irrelevant. We might have expected him to ask about what ASCAP's

position was but it may be relevant what 3M's was.

Overruled.

A We did discuss it.

Q Do you recall the substance of that discussion?

A Yes. Mr. Lindgren and I in our discussions regarded the proposal as unacceptable.

Q Do you recall the reasons why you regarded it as unacceptable?

A The proposal did not do anything to meet our time period problem nor did it indicate to us that we could authorize 3M salesmen to actively entered the market and to pass onto purchasers of these categories a performing rights license for a sufficient flat period of time.

I recall also that by this time I think that 3M's interests had been enlarged beyond doctors and dentists offices and the type of installation that we were discussing earlier and this proposal by ASCAP only concerned itself with doctors, dentists and small factories.

Q Do you recall whether you requested that ASCAP give you a quote for the larger establishments, the establishments other than the doctors and dentists offices and small restaurants?

A I am sure we did at some time but I don't recall specifically when.

Q I would like to show you 3M PX7.

MR. TOPKIS: Do you mean 6?

THE COURT: Do you have the right one? The one you want?

MR. BAKER: I will check and make sure, sir. Right, yes.

Q Does this letter refresh your recollection as to whether you requested a quote for those types of establishments?

A Yes.

Q And this letter is ASCAP's response to that request?

A Yes.

MR. BAKER: I would like to offer it into evidence at this time.

MR. TOPKIS: No objection, your Honor.

MISS KEARSE May I ask how many pages this document has? I have one that has only one page.

MR. BAKER: That's it.

THE COURT: All right. Received.

xxx (3M PX7 was received in evidence.)

Q Do you recall, after the July 31, 1964, meeting, when your next meeting was with ASCAP?

A I don't recall specifically but --

Q Try October 14, 1964.

A My diary doesn't show that date at all. I mean October 14.

Q Let me go back a little bit then and ask you whether during the period of August and September 1964, you together with representatives of 3M, gave any consideration to what approaches 3M might take in securing performing rights licenses other than dealing with ASCAP.

A I think by mid-October we had considered other approaches than dealing with ASCAP, yes.

Q Do you recall what those were?

A We discussed asking the Federal District Court to set a rate, we discussed selling the machines to customers and letting them obtain their own performing rights licenses.

We discussed the possibility of putting the machines in the field and then coming back to negotiate with ASCAP after the fact.

THE COURT: I didn't hear the third one.

A We discussed the possibility of selling the machines and then negotiating with ASCAP while the machines were in use and we discussed negotiating directly with publisher members of ASCAP.

MR. BAKER: May the record show that I am

handing the witness 3M PX8.

Q I would like to ask you if you can identify this document.

A Yes, I do remember it.

Q And there are certain paragraphs in here which are double-spaced and then they are followed by paragraphs which are single-spaced, preceded by the word "comment."

Can you tell me who was the author of the comments?

A I think Mr. Lindgren was the author of this antire document.

THE COURT: Is this document being shown to Mr. Arrow to refr esh his recollection?

MR. BAKER: No, sir. It is being shown to him because I thought he was the author of the comments.

THE WITNESS: Would you like me to read the document thoroughly? You asked if I recognized it.

Q Well, let me ask you to look at Page 4, the second comment on that page and ask you if you are the author of that comment.

A Yes, but I am not sure that I wrote it in this form. In other words, I think the reason for the misunderstanding is that I believe Mr. Lindgren actually arranged to have this document typed in our office and

the comments to which he is referring, the single-spaced comments are comments which I gave him during discussions and either he summarized or had typed.

Q In that case, let me just go to the question -- do you recall discussing with representatives of 3M any possible harassing tactics which can be used by SCAP, should you proceed with consent decree proceedings?

MR. TOPKIS: If your Honor please, I submit that that could not be less relevant. Suppose Mr. Lindgren believed or disbelieved that ASCAP might proceed with some kind of harassing tactics. I have no idea where Mr. Lindgren is at the present time and I can't imagine how I could cross-examine him.

THE COURT: Well, you could cross-examine Mr. Arrow. But the question in my mind is what relevance there is that there were such discussions.

You are perfectly free to argue to me, of course, that there are possibilities inherent in the situation, if there are, but what is the probative value of what their view of it was?

MR. BAKER: All I am trying to bring out here in the interest of trying to make a complete picture is the alternatives available to the one person that we know of who was able to --

THE COURT: I understand that.

MR. BAKER: And I think that there has been some discussion here that,by counsel for the other side, that you always have the right to go to the consent decree court and there is no problem, and that everything is nice and that is why you are here and you can always go and get up a program license, and I would just like to determine how 3M dealt with or regarded the problem of this alternative.

MR. TOPKIS: Do I understand then that we are going to be litigating in this court still another issue, namely, whether ASCAP has interfered with anybody?

THE COURT: I will allow Mr.Baker, subject to what Miss Kearse has to say, to ask whether they sought a license from the District Court and if not, why not.

MR. TOPKIS: I will object to it if not why not.

THE COURT: I understand you do but, Miss Kearse is your position the same?

MISS KEARSE: My position is the same as Mr. Topkis, and I would also state an objection on hearsay grounds to any discussions between Mr. Arrow and 3M people which were not attended by the defendant, and I would like a continuing objection to that, your Honor.

THE COURT: I am sustaining the objection to the discussions as such, but I will allow a report as to whether you did something and if you did not, why you did not.

MR. TOPKIS: Well, your Honor, forgive my belaboring the point, but do I understand then that the witness is not being asked for why Mr. Lindgren didn't do something, the witness is being asked why he didn't do something?

THE COURT: No. He is being asked why if, 3M, I gather from the tone of the conversation that 3M did not ask Judge Ryan or whoever was then the Judge, and I believe it would be probative and competent for him to testify as the attorney for the company or somebody participating in this process, the reasons for which the company did not request a license.

Now, you can pin it down farther, if you want, in the course of examination as to who said what, but I understand you are objecting to the conversations and I agree with you as to the conversational aspect of it.

MR. TOPKIS: Fine.

MR. BAKER: Your Honor, the question is based upon a comment in this document which, although he may not have been the author in the sense of putting pen to paper, I understand that he may have been the source of the

statement.

THE COURT: I don't see that makes any difference. It doesn't seem to me that is really terribly important what Mr. Arrow sat around and talked to his client about.

But it is what they did and why that I am interested in or what they didn't do and why they didn't do it, and I assume that Mr. Arrow can answer questions on that subject.

Q You have testified that you considered entering into consent decree proceedings and I believe the question which his Honor said I could ask was, if you did not, why did you not.

THE COURT: You being 3M, of course.

A We didn't believe it was a practical solution to the problem in the first place. We thought there was a good deal of uncertainty with respect to the timing of the Court's response to 3M's petition.

We didn't think it was likely that we could have a response in time to put the program in order.

Secondly, I was concerned that the complications of the situation were such that we might have some difficulty in having the ruling Judge understand the practical problems of the background music industry and --

THE COURT: I share your apprehension about that, not as to my fellow Judge, but as to the difficulty of understanding these things.

A And the third, in the third place, I think 3M's position consistently was that it wanted to stay out of courts.

Q I take it --

THE COURT: Did you believe that ASCAP would attempt to impede such an application? Was that one of your considerations?

THE WITNESS: I felt that ASCAP --

THE COURT: You personally, you mean?

THE WITNESS: Yes, sir -- that ASCAP would have taken the position that 3M would be required to pay more money than 3M was ready to pay and I also believed that ASCAP would have tried to induce the Court to rule that the Muzak or Seeburg type of license was the one which should apply to the 3M project.

THE COURT: Would I be correct in saying that it was your belief that ASCAP would continue to hold a position before Judge Ryan or whatever Judge it was that they held in their discussions with you up to that point?

THE WITNESS: Yes.

Q Directing your attention again to the comment

on Page 4 of PX8, I would just like to ask you one more question on this general subject.

Did you believe that ASCAP might make it difficult for 3M in terms of ASCAP representatives contacting either your dealers or 3M customers?

MR. TOPKIS: I object, your Honor. That seems to me to be a leading question. The witness has been thoroughly interrogated on --

THE COURT: Sustained.

MR. BAKER: Let me put the question this way --

Q Did you anticipate any other problems with ASCAP should you proceed with consent decree proceedings?

MR. TOPKIS: I object, your Honor.

THE COURT: Overruled.

A We anticipated that with the time lag between the date of our application and the date of ruling that 3M would have substantial amount of money tied up in machinery and inventory and that in order to put the program on a business basis, 3M might have to start selling machines pending the Court's decision.

We felt that ASCAP's field representatives could make life very uncomfortable for 3M salesmen at that time by inquiring whether 3M's purchasers had obtained licenses or whether 3M had obtained them on behalf of its purchasers.

We thought it could be an embarrassing position for the company to be in.

THE COURT: Would it be fair to state that you were worried that you might have to use the music before you had a license and that ASCAP might assert its rights if you did so?

THE WITNESS: Yes, sir.

MR. TOPKIS: If your Honor please, the amended final judgment makes licensing automatic, once the application is made.

THE COURT: Okay, but I am asking him what his concern was.

Q If I recall correctly, Mr. Arrow, you had no recollection and no indication in our diary of meeting on or about October 14, 1964?

A You asked me before whether I had a recollection of a meeting on October 14, and I do have a note of a meeting on October 16.

THE COURT: That is with ASCAP?

THE WITNESS: With ASCAP.

Q Do you recall who was at that meeting?

A I know that Mr. Lindgren was there. I don't recall who else was there.

Q And you were there?

A Yes, sir.

Q Do you recall whether you discussed the proposal submitted by ASCAP at an earlier time to 3M?

A I am sure we discussed some proposal which was submitted by ASCAP or 3M at an earlier time. I can't recall from this diary which proposal was discussed.

Q Do you recall whether 3M made any counter proposals of its own?

A I am sure it did.

Q But you don't recall any specific counter proposal?

A No, sir.

Q Do you recall when the next meeting was?

A According to my diary, we had a meeting next on October 21 at ASCAP.

Q Do you recall who attended that meeting?

A Mr. Lindgren attended it with me.

Q Do you recall who attended on behalf of ASCAP?

A No, not specifically.

Q Do you recall the substance of any proposal made by 3M or any response by ASCAP from that meeting?

A I believe that that was the-- I think that that was the meeting at which we resolved that we could not come to an agreement with ASCAP along the terms that we had been considering.

THE COURT: Are you saying that 3M made that decision or that it was sort of an announcement of agreement to disagree? I am not quite clear.

THE WITNESS: No, I think we made the decision towards the end of that meeting, Mr. Lindgren and I, and we left the room believing we could never make the kind of agreement with ASCAP that we could --

THE COURT: But you did not communicate that to ASCAP at the meeting?

THE WITNESS: I think we might have. I think we did.

Q Do you recall whether you submitted a written proposal to ASCAP prior to that meeting?

A I think we did submit a written proposal at some time between the meeting of October 16 and October 21.

Q I would like to show you PX 687 and 3M PX 11.

MR. TOPKIS: The same document?

MR. BAKER: As 687?

MR. TOPKIS: Yes.

MR. BAKER: No.

MR. TOPKIS: Two different.

Q Now, PX 687 is a letter from you addressed to Mr. Korman.

Do you recognize that?

A Yes.

Q You sent that letter?

A Yes.

Q Is 3M PX 11 the tentative proposal referred to in that letter?

A Yes.

Q Could you just briefly skim the one page of 3M PX 11 and see if that refreshes your recollection in any way as to what was discussed at that meeting?

MR. TOPKIS: It is two pages.

MR. BAKER: If it is I have a problem.

MR. TOPKIS: 3M PX 11? I have two pages.

THE COURT: How many pages does your copy have?

THE WITNESS: I have only one, your Honor.

THE COURT: Does anybody have the original?

MR. RIFKIND: Yes, I am handing the witness the original, your Honor.

THE COURT: All right, does that have two pages?

A Excuse me, is there a question?

Q The question is does the review of this document refresh your recollection in any way regarding the substance of the discussions at the meeting of October 21?

A Yes.

Q And would you relate those to us?

A Yes. The proposal which is embodied on these two pages formed the basis for 3M's final position with ASCAP.

THE COURT: As expressed at the meeting?

THE WITNESS: As expressed in the meeting.

The only thing I don't see reflected in this proposal is the actual rate in terms of dollars, but it did form the basis of our discussion as to the scope, type, and terms of the license which we were looking for.

It also reflected our proposed solution to the various problems which we thought were inherent in the concept of selling the machines rather than leasing them.

MR. BAKER: I would like to offer 3M PX 11 into evidence at this time.

MR. TOPKIS: No objection, your Honor.

Your Honor, on the voir dire the document contains some handwritten interlineations. Could the witness tell us whose handwriting that is?

THE WITNESS: That is my handwriting.

MR. TOPKIS: Fine. No objection.

MISS KEARSE: May I ask one further question of the witness?

THE COURT: Yes.

MISS KEARSE: Were the handwritten interlineations placed on the document before or after they were sent to Mr. Korman?

THE WITNESS: I have an impression that they were made by me during the meeting, but I am not certain.

THE COURT: Sometimes the significant thing is-- I don't know how serious the handwriting interlineations are -- but am I correct in understanding that with the interlineations included they would express the substance of what was discussed at the October 21 meeting?

THE WITNESS: Yes, that would in sum be the proposal which was made by 3M at that meeting.

THE COURT: Including the interlineations?

THE WITNESS: Including the interlineations.

MISS KEARSE: Am I correct in understanding this is offered to show these proposals were made?

MR. BAKER: Correct.

MISS KEARSE: As to that fact. No objection.

THE COURT: We are just talking now about 3M PX 11, is that right?

MR. BAKER: That is correct, your Honor.

xx (Exhibit 3M PX 11 received in evidence.)

Q Mr. Arrow, I would like to show you 3M PX 12 and ask you if you can identify that document.

A Yes, I can identify this document.

Q By whom was the document prepared?

A By Mr. Lindgren.

Q Do you recall for what purpose it was prepared?

A It was prepared as an alternate proposal to ASCAP in the event we were unable to convince ASCAP to issue the kind of license discussed in the previous proposal.

Q The previous proposal being the document you just examined, 3M PX 11?

A Yes.

Q Was this proposal discussed at the meeting with ASCAP?

A I don't recall that it was discussed. I am not sure we ever got to it.

Q I believe that you stated previously or indicated previously that some time during the course of that meeting at least the people on the 3M side of the table reached the conclusion, tentative or otherwise, that they may not have been able to reach an agreement with ASCAP.

Did I characterize what you said previously correctly?

A I would just add a few words to the end of your statement, and that is we could not reach an agreement with ASCAP in time to get the program implemented within 3M's time schedule.

Q We have talked about several of the reasons 3M and ASCAP could not get together.

Would you just summarize briefly the principal problems which existed between 3M and ASCAP at the close of the negotiations on October 21, 1964?

A We had a problem with respect to the rates which would apply on an average basis for differing types of locations and with differing sizes.

We had a problem with respect to the necessity of 3M to issue or to obtain on behalf of its purchasers a license for a consistent period of time, say three years instead of two years and ten months or ten months or ten days.

We had a problem with respect to the deletion of individual compositions from the ASCAP repertoire from time to time during the existing periods of license.

We felt that the rate which was proposed by ASCAP for specific types of installation was higher than

was justified under the circumstances; and we were also becoming quite concerned with the delays in the negotiations bearing in mind that 3M thought at that time that it had to get the program underway and in the field by April 1st, 1965.

THE COURT: I think this would be a good time for us to take a short break.

Do you have just a short question?

MR. BAKER: I just have a short question.

Q You said deletion of the works from the ASCAP repertory.

Is this with reference to the right of ASCAP members to place restrictions on the performances of certain compositions under certain circumstances?

A Either restrictions or to delete them from time to time because they had lost their rights or voluntarily deleted them for other reasons.

THE COURT: We will take a ten-minute recess.

(Recess.)

BY MR. BAKER:

Q Mr. Arrow, it occurred to me during the break there were two other brief subjects I would like to ask about concerning your negotiations with ASCAP.

I believe you mentioned that one of the problems

was the posit that 3M might have to pay the Muzak rate.

Did you discuss with ASCAP any reasons why 3M should pay a different rate than the Muzak rate?

A Yes.

Q Was that different rate higher or lower than the Muzak rate?

A At several time during the negotiations we had proposed a lower rate.

Q What was the basis upon which you thought that 3M was entitled to a lower rate?

A The first basis was that we were using a limited number of compositions and that we did not need access to the entire ASCAP retertoire.

The second reason was that we thought that 3M's sales would be to a lower classification of establishment than was at that time being serviced by Muzak and Seeburg.

Q When you say lower classification of establishment, would you give a little more content to determine classification or what classification system you are referring to?

A Well, for example, under the rating system which was then employed by ASCAP for background music use, large factories were required to pay more for performing fees than small factories; and large restaurants were required to pay

more than say small luncheonettes; and to the best of our knowledge doctors and dentists were not paying anything at all.

So that it was our feeling that we were attacking a market which had to some extent never been attacked before, that we were going to -- that the result of our efforts was going to be to pay ASCAP for uses which had not been paid for before, and that the type of installation was going to be that which was at the low end of the financial scale rather than the high.

Therefore, we were entitled to a lower rate than that which was applicable under the Muzak form of license.

Q The license which 3M sought was for a period of three years, is that correct, on behalf of its purchasers?

A The license which 3M sought on behalf of its purchasers was three years for each purchaser.

THE COURT: From the time they purchased?

THE WITNESS: From the time they purchased, yes.

Q How did 3M contemplate that those establishments would be licensed after the expiration of their three-year license?

A We contemplated either that-- that ASCAP or other performing rights societies which were involved would license them directly, or that 3M would sell them replacement tapes

which would carry their own licenses, or that with normal wear and tear the tapes might no longer be usable after three years and so the problem would become academic.

Q Did ASCAP express any view to you regarding these problems which might be raised by the fact that 3M proposed to obtain a license on behalf of its purchasers limited to three years?

A Well, ASCAP at various times asked 3M to guarantee to ASCAP that the purchasers who continued to use the music would continue to pay performing fees.

Q Did 3M propose any alternative to that, alternative solutions to ASCAP?

A I can't recall specifically offering any alternative other than the practical solutions which I just discussed.

Q Do you recall whether 3M offered to provide ASCAP with licenses of the purchasers of the M700 machine?

A Yes, we did, but that was to implement ASCAP's direct contact with those purchasers after the expiration of the three-year license.

Q There obviously was a gap of communication because that was the purpose of the question, to determine whether there had been an alternative proposal to deal with the problem of licensing establishments after the expiration of

the three-year license.

A Okay.

Q You said that on October 21, 3M at least came to the conclusion that they may not be able to deal with ASCAP for performing rights.

Was 3M given any consideration at that time as to how they would have licensed the mechanical rights had they entered into an agreement with ASCAP?

A Yes.

Q Would you describe that consideration?

A Yes. We thought at that time that we would seek licenses for mechanical rights from music publishers along the same lines that Muzak was doing at that time; in other words, $5 per year per composition.

Q Regardless of the number of tapes sold?

A Regardless of the number of tapes sold.

Q Did you expect to obtain those licenses directly from music publishers or through the Harry Fox Agency?

A I don't think we had focused on the question of whether we would apply to Fox or apply directly to the publishers.

Q Had you given any consideration to obtaining performing rights licenses through Fox?

A No.

Q Can you describe the status of the M700 project as of approximately October 21 in terms of the extent to which 3M had prepared its factories or whatever it had for the manufacture of that equipment?

How far down the line were you in the creation of the M700 machine?

A To the best of my recollection, they had made ten or twelve prototype machines. They had designed the tooling for the machines. They had applied for and obtained licenses for the patents which were used in the machine or had applied for other patents, and they felt that given a go-ahead, they could have a sufficient number of machines manufactured to get into the market by April 1st, 1965 -- April 1st, 1965, right -- after engaging in a one-month or so test marketing program.

Q In or about October 21, 1964, did 3M give any consideration to abandoning the M700 project?

A Yes.

Q And could you describe that briefly?

A There was some consideration of abandoning it in the event that 3M could not obtain proper licenses to perform the music.

Q Let me ask you, after October 21, 1964, what was the next step that 3M took down the road to obtaining

performing rights licenses?

A We took a step on October 21.

Q What was that step?

A That was immediately after the meeting with ASCAP, Mr. Lindgren and I left ASCAP's offices, we had a 15-minute discussion about what the next step would be, and we determined that we would approach publishers directly.

We approached the first publisher that afternoon.

Q Who was the first publisher?

A Chappell.

Q To whom did you speak at Chappell?

A Mr. Ricketts.

THE COUR.: Is that Chappell American Chappell?

A We approached American Chappell but Mr. Ricketts was actually to the best of my knowledge employed by English Chappell.

Q Do you know whether Mr. Ricketts at that time had any responsibilities with respect to Chappell, Inc., which I will use to refer to the American Chappell as opposed to the Chappell Limited, which I will use to refer to the English Chappell?

MR. TOPKIS: Your Honor, I don't believe Mr. Arrow is competent to testify on that subject.

THE COURT: If he isn't, he can say so.

THE WITNESS: I beg your pardon?

THE COURT: If you don't know or have adequate knowledge, you can say so.

A I don't know. I did have an impression.

THE COURT: Did he hold himself out to you as negotiating or talking on the part of American Chappell?

THE WITNESS: I think at that time the impression I had was that the American company and the English company were very close, and that Mr. Ricketts, while his principal functions were to manage the English company, he did have some managerial responsibility and authority in New York.

We certainly did approach him on behalf of American Chappell and not English.

THE COURT: Thank you.

Q Was there any particular reason why you approached Chappell first?

A There were two reasons; perhaps three. In the first place, Chappell's was at that time the-- had the catalog most sought after by 3M.

In the second place, I knew that Mr. Ricketts was in New York and I regarded him as very wise and very knowledgeable in this industry, and in the third place, it happened to be very proximate to ASCAP.

THE COURT: You mean physically?

THE WITNESS: Physically. So we just walked there.

Q Can you relate for us the substance of your discussion with Mr. Ricketts on October 21, 1964?

THE COURT: As I understand it, you left the one meeting and went over to Chappell, is that right?

THE WITNESS: Yes, I think we stopped for some coffee on the way and to discuss what approach we would make to Chappell's.

I probably called Mr. Ricketts from the coffee shop and he was kind enough to see us and we walked in.

Q Mr. Arrow --

A Sorry.

Q That's all right. The question was can you recall the substance of your discussion with Mr.Ricketts concerning the M700 project at that meeting?

A Yes. I introduced Mr. Ricketts to Mr. Lindgren and then told him that we had been in negotiation with ASCAP and felt that we could not reach agreement.

We told him that we thought that there were time problems which would probably prevent meaningful discussions from being concluded at ASCAP, or a meaningful agreement from being concluded, and we told him that we wanted

to try to obtain licesnes directly from the publishers.

Mr. Ricketts was very curious about the program, and Mr. Lindgren then proceeded to demonstrate the background music machine he had with him, and it played very well but the tape spilled out all over the floor, and Mr. Lindgren was unable to fix it to get it to work properly during the meeting.

But Mr. Ricketts said he was very interested in 3M's position. He asked whether we had a specific proposal and we made one to him.

Q Do you recall what that proposal was?

A Yes, we offered to pay Chappell's for direct license a two-cent per composition per copy mechanical royalty, and a three-cent per composition per copy performing rights royalty. The performing rights license would last three years from time of purchase.

Q From the time of purchase of the tape by the 3M customer?

A Yes.

Q And did you discuss with Mr. Ricketts the question of whether 3M would be prepared to offer Chappell some sort of guarantee?

A I think we did, either at that meeting or the next meeting.

Q Do you recall the nature of that guarantee?

A Yes. We had estimated a minimum sale of 6000 cartridges of the first tape to be produced, so we multiplied 6000 by the 5 cent royalty and were prepared to offer Chappell a $300 guarantee per composition for the use of its repertory.

Q You mean a minimum sale of 6000 tapes. Was that in the first year or the first three years or --

A I think although we estimated the sale to be within the first year, we hedged in our proposal so that in the event we didn't sell them in the first year we could go on to apply the guarantee against future royalties.

Q Did you offer to guarantee Chappell that 3M would use a certain number of songs from its catalog?

A Yes, we did.

Q Do you recall how many songs?

A I think it was somewhere between one and 200.

Q In the course of your discussions with Mr. Ricketts, did you discuss any of the specific reasons as to why 3M and ASCAP had been unable to reach agreement?

A Yes, I am sure we did.

Q You don't recall any?

A I am sure, Mr. Baker, that at the first or second meeting with Mr. Ricketts or both or at subsequent meetings with Chappell, thematter was fully discussed.

Q Do you recall when the next meeting was with Chappell, after October 21, 1964?

A According to my diary, it was October 27.

Q I forgot to ask you,how were your discussions with Mr. Ricketts left at the end of the October 21st meeting?

A I think he, at the end of that meeting, he said he would consider the proposal, that he was fascinated by it or at least very interested, that he would recommend it but that he wanted to check the circumstances and facts which were related to him with his board of directors or possibly other people.

Q Did he indicate whether he wanted to check the facts or circumstances related to him by representatives of ASCAP?

A I think he did say that he would.

Q Do you recall who attended the October 27, 1964, meeting?

MR. TOPKIS: What meeting?

MR. BAKER: October 27, 1964.

A Mr. Ricketts, Mr. Lindgren. I was there and I don't recall whether Mr. Wattenberg was there or not. He may have been.

Q Who is Mr. Wattenberg?

A He was resident counsel for Chappell.

Q Do you recall the substance of the discussions at that meeting?

A Well, I think we repeated the proposal made at the first meeting. Mr. Lindgren had gotten an engineer from St. Paul to fly in and fix the machine by then and it was demonstrated again, this time it worked, and Mr. Ricketts said he would consider the entire situation, that he thought a lot of money could be made and would probably recommend the proposal.

Q Did he indicate whether he had discussed the status of the 3M-ASCAP negotiations with representatives of ASCAP?

A I don't recall.

Q Did Mr. Ricketts express any view concerning his preference between publishers licensing 3M directly and 3M licensing performing rights through ASCAP?

A Yes, I think he did.

Q What was that view?

A His view as expressed to me was that he regarded the performing rights associates as most suited to license performing rights, but if they didn't do it or couldn't do it, he was prepared to recommend that his company do so directly?

Q Do you recall when was your next communication with a representative of Chappell? You being Mr. Arrow.

A I can't recall the date.

Q Do you recall with whom the communication was?

A It would probably have been with Mr. Wattenberg but I don't recall specifically.

Q I would like to show you 3M PX14, and ask you if it refreshes your recollection.

A Would yourepeat the question?

Q Yes. The question is, does reviewing t his letter refresh your recollection as to when your next communication was with a representative of Chappell.

A It doesn't indicate when my next communication was with Mr. Chappell -- with Chappell, but it does indicate

that at some time prior to December 1, 1964, I had a conversation with Mr. Wattenberg. There may have been other conversations before that.

Q Do you recall the substance of that conversation?

A Yes.

Q Could you relate it to us, please?

A Yes. We spoke on the telephone and Mr. Wattenberg indicated to me in response to my inquiry that he was prepared to recommend that Chappell license 3M in accordance with our proposal.

He told me that he already had passed that advice along to Mr. Ricketts and to Mr. Ricketts' associate, Mr. Rogers, and that he was feeling very optimistic that we would enter into a contract.

I told him I would prepare a form for him and send it to him.

Q Do you recall whether you discussed with Mr. Wattenberg at that time a letter which Mr. Lindgren had sent to Mr. Ricketts?

A I don't recall having any such discussion but I might have.

Q Do you recall any such discussion subsequent to December 1, 1964?

A I believe I probably discussed some correspondence

with Mr. Wattenberg. I don't recall when I had the discussion or how important it was, but I think we did have a discussion.

Q I would like to direct your attention to 3M PX171, and ask you if this refreshes your recollection.

A Yes.

Q The first page of PX171 is a letter from you to Mr. Wattenberg.

A Yes.

Q Forwarding a copy of the letter which is attached thereto, namely, a letter from Mr. Lindgren to Mr. Ricketts,dated November 27, 1964.

A Yes.

Q Did you discuss the substance of the letter which Mr. Lindgren wrote to Mr. Ricketts?

A You mean with Mr. Wattenberg?

MR. TOPKIS: With whom?

Q With Mr. Lindgren.

A Did I discuss it with Mr. Lindgren?

Q Yes.

A Yes, I did.

Q And did you discuss the substance of that letter with Mr. Wattenberg?

A I don't recall whether I did or I didn't. Perhaps

I should be more clear. I did have discussions with Mr. Wattenberg about the issues which were raised in this letter by Mr. Lindgren, but I am not sure whether I discussed this letter with him.

In other words, the issues which Mr. Lindgren discusses were the subject of a number of conversations which I had had with Mr. Wattenberg.

Q Do you recall what those issues were?

A Yes. They were the same issues which led us to seek direct licenses from the publishers. In other words, the issues which were raised by ourselves and ASCAP in our negotiations.

Q Do you know whether the letter of November 27th was ever received by Mr. Ricketts?

A I believe it was.

Q Do you know whether a copy of it was ever received by Mr. Wattenberg?

A You mean from me?

Q Yes.

A I think so. But -- because subsequently I think Mr. Wattenberg told me he received it.

MR. BAKER: I would like to offer 3M PX 171 into evidence at this time.

MR. TOPKIS: I have no objection to its admissibility, your Honor, for non-hearsay purposes but for hearsay purposes, I would, of course, object to it.

THE COURT: What is your offer?

MR. BAKER: I am offering it as evidence of the proposal made by 3M to Chappell at that time.

THE COURT: All right.

MR. TOPKIS: Well, it is not that action in fact. In fact, it is a letter which is not a proposal from Mr. Lindgren to Mr. Ricketts in London, but I have no objection to its being received as such letter.

THE COURT: All right.

Received.

MR. BAKER: I may be able to clear that up.

Q Do you recall the purpose for which this letter of November 27th was written by Mr. Lindgren to Mr. Ricketts?

MR. TOPKIS: I would suggest, your Honor, that the man to whom to address that question is Mr. Lindgren.

THE COURT: Certainly, yes, unless Mr. Arrow knows, but I don't know how you would know.

I don't know what were the circumstances. Was it solicited?

MR. BAKER: Was it solicited by Chappell? Do you know?

THE COURT: Do you know whether it was solicited?

THE WITNESS: I was told by Mr. Lindgren that it was.

THE COURT: Never mind.

I don't see the problem created by admitting this solely for the purpose of being a letter sent by Mr. Lindgren.

xxx (Exhibit 3M PX171 received in evidence.)

Q Directing your attention to the second paragraph on the fourth page of PX171, does that refresh your recollection with respect to the number of titles which 3M was prepared to guarantee Chappell?

A You are talking about the second paragraph on Page numbered 4?

Q Right.

A I believe I testified earlier that we offered to guarantee Chappell's use of between 100 and 200 titles. It is certainly possible that at some time during the discussions we increased that to 200, but I don't recall specificallythat we did.

Q Was 3M able to reach agreement with Chappell for performing rights to be used in connection with the M700 project?

A No.

Q Would you tell us the reasons that 3M and

Chappell were unable to reach agreement?

MR. TOPKIS: Well, I think I would object to that question, your Honor. I have no objection to a narrative statement of what happened but --

THE COURT: All right. Let it be in those terms.

Q Did Chappell indicate to you any reasons why it was unwilling or unable to enter into such an agreement?

MR. TOPKIS: I object to that question, too. Can't we have an ongoing narrative of what happened?

THE COURT: I think that the narrative version of what happened would be better.

Q After you sent your letter of December 4, 1964, to Mr.Wattenberg, what happened next?

A At some time, I think fairly shortly thereafter, we were told that Chappell would not enter into this kind of agreement with ABC.

THE COURT: Told by whom?

THE WITNESS: I was told by Mr. Wattenberg. I don't recall whether I was also told by Mr. Ricketts specifically at that time.

Q Did Mr. Wattenberg tell you why?

A I think he indicated to me that Mr. Ricketts felt, in particular, that the performing rights should be

licensed by ASCAP and that Chappell was therefore unwilling to make a direct license with 3M.

Q Did the representative express any view concerning the possibility that ASCAP and 3M could reach agreement at a subsequent time?

THE COURT: Did who express that?

MR. BAKER: The representative of Chappell who told Mr. Arrow --

THE COURT: Let's have a name.

Q Mr. Wattenberg.

THE COURT: Was it Mr. Wattenberg you were talking about?

THE WITNESS: I was talking about Mr. Wattenberg before.

A At some time, Mr. Baker, during the period following the refusal of Chappell to enter into a license, we were asked by either Mr. Ricketts or Mr. Wattenberg or both whether there was any possibility of reopening negotiations with ASCAP.

I don't recall how much discussion there was on the subject. I do remember that there was some discussion.

Q Did Mr. Wattenberg or Mr. Ricketts indicate to you that they had been in touch with representatives from

ASCAP concerning renewed 3M-ASCAP negotiations.

A They might have. I seem to recal that there was some -- I think Mr. Ricketts at some time told me that he had indicated to Mr. Finkelstein that he thought ASCAP should try to make an agreement with 3M.

Let me clarify that -- that might have been some time after December 1964.

Q When was the next occasion on which you had discussions with representatives of Chappell concerning the licensing of performing rights for the M700 project?

THE COURT: You mean after the time he was told there would be none?

MR. BAKER: After the time he has told us that they had -- well, let me ask a prefatory question.

Q The discussions which we have just been talking about, did those relate to the M700 first series of cartridges?

A Yes.

Q Subsequent to that time, did you have discussions with a representative of Chappell concerning licensing and performing rights for the M700 second series of cartridges?

A Yes.

Q Do you recall with whom you discussed that

subject?

A I believe I discussed it with Mr. Ricketts.

Q How did those discussions come about?

A Well, Mr. Baker, I think that, first of all, there had been a number of contacts after December, 1964, and the time when we had a meaningful discussion with respect to the second series of cartridges.

These contacts took place in England where 3M was trying to negotiate with the performing rights society and Mr. Ricketts was peripherally involved and I also had other business with Chappell at which time I would be in contact with Mr. Ricketts and the subject was generally discussed, I would say, 10 or 12 times between December of 1964, and the time when we had a meaningful discussion with respect to the second series.

Q Do you recall approximately when that meaningful discussion took place?

A No.

Q I would like to direct your attention to 3M PX17 and ask you if that refreshes your recollection.

A Yes.

Q Can you place approximately the time of that second discussion?

A Well, the discussinn that this letter refers

to would have taken place in late January or early February, 1968.

Q Do you recallgenerally the subject matter of that discussion and who said what to whom and how the m*tter was left?

THE COURT: '68, this is, right?

THE WITNESS: '68.

A Yes. I had traveled through Europe to South Africa and some time during the trip and prior to the time I arrived in South Africa, I had had a conversation with Mr. Ricketts or another representative of Chappell with respect to a resumption of recordings, of recording, to improve the 3M libraries and at that time I had suggested that perhaps with the passage of time since our initial discussions Chappell might have changed its mind.

I believe that I had gotten word either from my office or from Mr. Ricketts that Mr. Ricketts was interested in having a further discussion and I called him from South Afrida. I was unable to reach him. He returned the call and got me at a restaurant in Capetown and we had a very garbled telephone conversation about the subject.

But he indicated to me that he was interested now in entering into an agreement on behalf of New York Chappell.

Q What happened next?

A When I returned to New York, I wrote this letter and I also called Mr. Wattenberg and tried to push the matter along. But we never --

MR. TOPKIS: And what?

THE WITNESS: Mr. Wattenberg --

THE COURT: Tried to push the matter along.

MR. TOPKIS: Thank you.

A But we never didenter into an agreement with Chappell.

Q Do you recall, were any reasons expressed to you by Mr. Wattenberg or Mr. Ricketts as to why no agreement was reached?

A You mean with respect to the M700?

Q The second series.

A I think it was just expressed to me that they had considered the matter and had not changed their position.

Q You mean they had reconsidered their earlier decision and --

A Yes.

Q I would like to hand you now 3M PX18 and ask you if you can identify that letter.

Is this a letter written by you to Mr. Bill Ricketts of Chappell, dated June 28, 1968?

A Yes.

Q Now, the letter refers to a mechanical rights licensing.

Could you tell us the name of the project in connection with which 3M sought such a mechanical rights license?

A Yes. This mechanical license was sought for the 3M 1200 program.

Q Could you just briefly describe for the record the 3M1200 program?

A Well, the 1200 program was actually a program which was based upon a modification of the 700 machine and an expansion of the tape cartridge to 1200 compositions instead of 700.

Aside from that, the program was basically the same although I think it was 3M's intention at several times to restrict the 1200 program to a lease program rather than a sale to a consumer-type of market.

Q The letter speaks only of mechanical rights licenses. From whom did you obtain the performing rights licenses for the M1200 program?

A From ASCAP, BMI and SESAC.

Q I would like to direct your attention to the last sentence which I will just read to you:

"I hope there will be no difficulty" --

MISS KEARSE: I object, your Honor, to reading from a document that is not in evidence.

MR. BAKER: All right, I will offer it in evidence.

MISS KEARSE: May I ask for what purpose it is being offered?

MR. BAKER: For the purpose of demonstrating that Mr. Arrow wrote Mr. Ricketts the words set forth in this letter on June 28, 1968.

MISS KEARSE: Mr. Arrow is here. Why can't we just have Mr. Arrow's testimony on this?

MR. BAKER: I asked him whether he did write it.

THE COURT: I will allow it in evidence for that purpose and I will allow the witness to be questioned about it.

xx (Exhibit 3-PX 18 received in evidence.)

Q Mr. Arrow, the last sentence reads: "I hope that there will be no difficulty with the mechanical license, but in the meantime I wanted to assure you that we are pleased that at least after all the correspondence

and passage of time, we are able to offer an agreement which will not cause you to search your conscience before executing it."

THE COURT: What were the last few words, "search your conscience" what?

MR. BAKER: "Which will not cause you to search your conscience before executing it."

Q Can you tell me, what did you mean when you said that the agreement sent to Chappell for mechanical rights for the M1200 will not cause you to search your conscience before executing it?

THE COURT: He expressed the hope it would not.

Q All right, expressed the hope.

A Mr. Ricketts had indicated to me that-- had indicated to me on more than one occasion that he thought that Chappell's performing rights should be licensed through ASCAP in the United States, and that he was concerned with the establishment of a perpetual performing right in the hands of 3M's purchasers in the event that ASCAP did not license and police those rights.

My expression was designed to convey the thought that in view of the fact that 3M had entered into an agreement with ASCAP with respect to the 3M 1200 project, this was no longer an issue.

THE COURT: Was the agreement that you referred to in your letter your proposed agreement with Chappel for mechanical rights or was it the ASCAP agreement that apparently had been worked out?

THE WITNESS: It was the agreement with Chappell for mechanical rights.

THE COURT: The implication was that it dealt only with mechanical rights, is that right?

THE WITNESS: That is correct.

MR. BAKER: I would now like to hand the witness Plaintiff 3M Exhibit 19.

Q Mr. Arrow, can you identify this letter?

A Yes.

Q And it is from Mr. William Ricketts-- M.E. Ricketts to you, is that correct?

A Yes.

THE COURT: Is there more than one Mr.Ricketts?

THE WITNESS: The man's name was actually Matthew Edward.

THE COURT: But we have always been talking about the same person?

THE WITNESS: Yes, the same Ricketts, but his name was Bill, which is why I suppose --

Q And you received this letter from Mr. Ricketts?

A Yes.

MR. BAKER: I would like to offer it in evidence at this time.

MR. TOPKIS: If your Honor please, this letter is from a man who writes on the letterhead of English Chappell, and who speaks of American Chappell as a different entity.

I would think that by its terms it demonstrates his lack of authority to bind American Chappell.

THE COURT: I can't tell that. Apparently he had connections with them both and purported to act for American Chappell and he can only use one letterhead, and maybe that is all the stationery he had.

If you want to illuminate that point one way or the other, I will be glad to have you ask questions on either side but --

MR. TOPKIS: All right.

MR. BAKER: Your Honor, I believe that Mr.Ricketts status in his relationship with American Chappell is set forth in the deposition of Philip Wattenberg previously taken in this case.

THE COURT: That is not in the record yet but Mr. Arrow has indicated what seems to me to be a clear if somewhat imprecisely defined role on Mr. Rickett's part

of talking from time to time for American Chappell, and subject to whatever detractions may be made of that evidence, I will accept the document.

xx (3M PX 19 received in evidence.)

THE COURT: I said that without even seeing what it said.

Q After your meeting on October 21, 1964, with Mr. Ricketts of Chappell, did you also have discussions with representatives of Leeds Music?

A After the meeting of October 21?

Q Well, after October 21.

A Yes.

Q Do you recall when the first meeting with representatives of Leeds occurred?

A According to my diary the first meeting was on October 29.

Q Do you recall how that meeting was arranged?

A How --

Q Did you call them, did they call you?

A I called Mr. Chiantia.

Q Do you recall who attended that meeting?

A Yes, Mr. Lindgren, Mr. Herzog, and me, and Mr. Chiantia, and I don't recall that anybody else from Leeds was there.

Q Do you recall what you told Mr. Chiantia?

A Yes, we told him that we had been unable to conclude an agreement with ASCAP, that 3M had a proposal it wished to make to a number of publishers, that Leeds was one of those we regarded as having a substantial catalog, and that we would be prepared to make an offer to Leeds for its ASCAP catalog and an offer to Dutchess Music for its BMI catalog.

THE COURT: Is that a subsidiary of Leeds or an affiliate?

THE WITNESS: I don't know whether it is a subsidiary but they are housed in the same place and have the same --

THE COURT: Mr. Chiantia represented them, too?

THE WITNESS: Yes.

Q Did you discuss with Mr. Chiantia the nature of the market at which the M700 project was directed?

A Yes.

Q I hate to make you repeat yourself but do you recall what you said in that regard?

THE COURT: Wouldn't it be fair to say that in substance you told him the same thing you had told the other people you had dealt with before?

A Yes.

MR. BAKER: Thank you.

THE COURT: You are very welcome. You can always try that with me, Mr. Baker.

Q What was Mr. Chiantia's response to 3M's presentation?

A He was very interested. He believed that 3M could use a substantial part or a substantial number of compositions from the Leeds-Dutchess repertoires; and he thought he would entertain the proposal favorably.

Q Did he indicate to you whether he had discussed 3M's direct licesning from publishers with respresentatives of ASCAP?

A I don't recall.

Q Did he indicate to you whether he intended to discuss that?

A Yes, I think he indicated to me that he would discuss it with Mr. Korman.

Q Did he indicate to you why he wanted to discuss it with Mr. Korman?

A I don't remember.

THE COURT: Am I correct that Mr. Chiantia is or was on the board of ASCAP?

MR. TOPKIS: He was not at the time, your Honor. He subsequently was elected to membership on the board.

THE COURT: I see. Thank you.

Q Directing your attention to page 287, beginning on line 9 of your deposition given in this action, I ask you if that refreshes your recollection.

MR. TOPKIS: As to what?

MR. BAKER: As to the previous question, which was whether Mr. Chiantia indicated thereasons that he wanted to discuss the 3M matter with representatives of ASCAP.

A Well, I think he did say at some time during our discussions-- I can't recall specifically whether it was at that first meeting-- that he wanted to verify with ASCAP that our negotiations were in fact ended.

Q Did he indicate to you why he wanted to verify with ASCAP that the negotiations were in fact ended?

A I don't recall that he specifically indicated that.

Q Do you recall how the discussions closed on October 29, 1964?

A I think Mr. Chiantia indicated that he would let us know what his position was within the next few days.

Q Did he do so?

A Yes, I think he did, whether it was the next few days or the next several days I can't recall, but he

certainly did call me to say that he thought that Leeds would go into the licensing program with 3M.

He invited 3M's music representative to look through their catalogs to determine what songs could be used, and at some time shortly after that, we did prepare a contract and send it to Leeds and to Dutchess.

Q Do you recall the terms of the agreement which you eventually entered into with Leeds?

A Well, the terms--

MR. TOPKIS: If there was an agreement I would suggest that is the best evidence of it.

THE COURT: Yes, I agree with you.

MR. BAKER: I would like to show the witness 3M PX 52.

Q Do you recognize this document, Mr. Arrow?

A Yes, I do.

Q Would you describe it for us?

A It is a contract between Leeds Music Corporation and Pickwick Music Corporation on the one hand, and 3M on the other, which embodies the understanding that we reached with Mr. Chiantia.

THE COURT: This was actually executed?

THE WITNESS: Yes.

THE COURT: What is the date of it?

THE WITNESS: March 1, 1965.

MR. BAKER: I would like to offer it in evidence at this time.

MR. TOPKIS: No objection, your Honor.

MISS KEARSE: No objection.

THE COURT: All right. Received.

xx (3M PX 52 received in evidence.)

Q Paragraph 10 of this agreement indicates that 3M guaranteed to use one hundred Leeds-Pickwick songs.

Do you recall there being any negotiations over the number of songs that would be guaranteed by 3M?

What was 3M's initial offer and--

A I don't recall whether 3M ever made an offer to Leeds and Pickwick other than one hundred.

3M's position at that time with Leeds-Pickwick and all the other publishers was that it wanted to use every composition in the licensor's repertoire which was suitable, and the publishers with which we dealt wanted us to use as many as we could; so that the chances are that if 3M thought that it could only use 50 or 75, that would have been its proposal; and if Leeds thought we could use 150, they might be trying to get us to use 150.

The money would go up. I gather that at some time 3M's artistic personnel and Leeds agreed to a hundred.

THE COURT: That was under the guarantee; you could have used more?

THE WITNESS: We could have used more if we decided to and Leeds approved the titles, but we were agreeing here to use a minimum of one hundred.

THE COURT: Right.

Q Mr. Arrow, was agreement with Leeds reached at some point in time? Was agreement reached between the parties, an understanding reached between the parties at some point in time prior to the execution of the agreement on March 1, 1965?

A Yes.

Q Do you recall approximately when that was?

A You mean complete agreement or do you mean an agreement in principle?

Q Agreement in principle.

A I believe we reached agreement in principle with Leeds some time within the 30 days following our meeting with Mr. Chiantia on October 29.

THE COURT: In other words, some time around the end of November or by the end of November?

THE WITNESS: I think so, sir. I think 3M actually began recording Leeds' compositions in November or December 1964, possibly January 1965.

THE COURT: May I ask a question about this agreement?

Paragraph 2 puzzles me in its present form. I see the original provided for the license or represented here the non-exclusive right to authorize public performance and so on and the right to sign the agreement.

That was altered merely to provide representation if he or it was a member of ASCAP.

Can you explain to me how that came about?

THE WITNESS: Yes, sir.

Mr. Chiantia was a very good lawyer and he didn't want his company to be responsible for one more warranty or representation than was required.

We had indicated to him initially that it was our view that as a member of ASCAP Leeds could under the consent decree license the non-exclusive performances of compositions in its repertoire. So Mr. Chiantia was shifting the responsibility of the warranty to us rather than to his own company.

THE COURT: Thank you.

Q At any time during the period between October 21 and the early spring of 1965, did you receive any communications from ASCAP publisher members indicating that their fellow publisher members or representatives of ASCAP did

not favor direct licensing of performing rights by 3M.

MR. TOPKIS: That seems to me to call for double hearsay, your Honor. I know where counsel wants to go but I think he can get there without hearsay.

THE COURT: I think that you can try to secure any testimony of reports as to what ASCAP people said but sometimes that is all that you can do by that method, isn't it?

MR. BAKER: I will try another approach, your Honor, to the subject.

Q At the time of the close of the meetings with ASCAP on October 21, 1964, did any representative of ASCAP indicate to you that 3M should consider approaching the members directly for performing rights licenses?

A I can't recall specifically that occurring at that meeting. I believe that on more than one occasion during our meetings with ASCAP's representatives, it was suggested that the type of license which 3M was seeking could best be obtained from its members, from ASCAP's members, that is.

THE COURT: Direct?

THE WITNESS: Direct.

Q After the October 21 meeting, did there come a time when you learned that ASCAP had been approaching its own members to advise them not to deal with 3M?

MR. TOPKIS: I object to that question.

THE COURT: Yes. I don't see how he can have larned it. It can have been reported to him.

If you want to give it as background for the reason for some action on Mr. Arrow's part, I will receive it for that purpose alone, that he received the report and did something about it.

Q If I change the word learn to report, was the report made to you?

THE COURT: Was he told, yes, but I am not receiving it for the truth of the statement, merely as to the basis for his doing whatever he did as a result of it.

Q After the October 21 meeting, was it reported to you that ASCAP had been approaching its own members to advise them not to deal with 3M?

MR. TOPKIS: I take it that calls for a yes or no answer, your Honor.

MR. BAKER: That is correct.

THE COURT: Yes, it does.

A Do you mean ASCAP as a society, ASCAP members, ASCAP directors, or --

THE COURT: Well, let's not spend more time than we need to.

Did you receive any report with regard to any of these people that an effort was being made to prevent you from getting direct licenses?

A The expression "efforts being made to prevent" is what is causing me difficulty.

We did receive reports there were contacts made with potential publisher licensors indicating that measure.

THE COURT: All right, that is perfectly satisfactory an answer from my point of view anyway.

I take it you want to know whether there were any steps taken by 3M as a result of that question?

Q The next question was, did you receive any such reports from Mr. Chiantia?

A Yes, I did.

Q Would you describe--

MR. TOPKIS: Wait. Excuse me, but I must object. I was a little slow. Mr. Chiantia at the time was an officer of Leeds but I don't see why that makes his statement about such report binding on us.

THE COURT: I don't either unless Mr. Baker can bring it out some other way.

MR. BAKER: I believe that Leeds is a named defendant in this action, number one, and therefore it would be binding upon them.

THE COURT: It may be binding upon them although I don't know what effect it would have.

MR. BAKER: I believe that takes care of the hearsay problem but, number two, if a representative of ASCAP had instructed them not to deal with 3M or advised them not to, or looked upon it with displeasure, I think that would be an admission on the part of the ASCAP representative who made that statement.

THE COURT: I don't agree to that. I don't think that becomes a problem. We don't have here a witness to cross-examine with respect to the substance of that allegation.

If you want to have Mr. Chiantia's testimony, call him and ask him.

MR. TOPKIS: He is going to be called.

THE COURT: Well, for CBS to call him if they want him.

Mr. Baker, as long as you are deep in thought, why don't we break now until two o'clock?

(Luncheon recess.)

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